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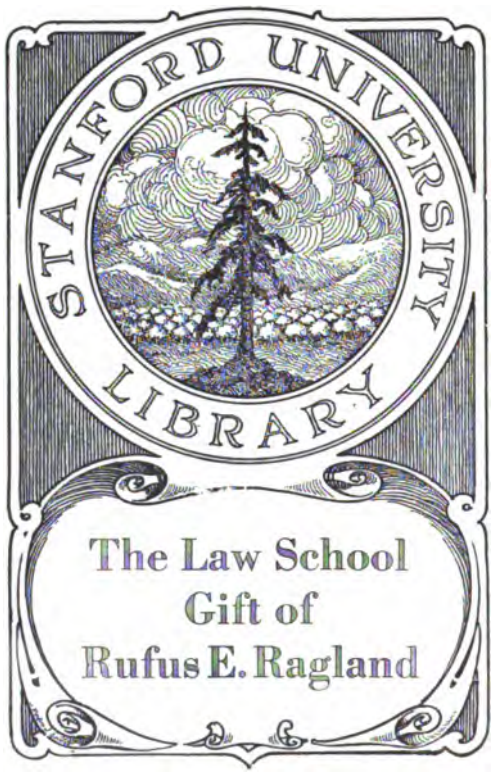

CONDENSED

REPORTS OF CASES

IN THE

Superior Court of the Territory of Orleans,

AND IN THE

SUPREME COURT OF LOUISIANA;

CONTAINING

THE DECISIONS OF THOSE COURTS FROM THE AUTUMN TERM 1809, TO THE MARCH TERM, 1830, AND WHICH WERE EMBRACED IN THE TWENTY VOLUMES OF FR. XAVIER MARTIN'S REPORTS;

WITH

NOTES OF LOUISIANA CASES, WHEREIN THE DOCTRINES ARE AFFIRMED, CONTRADICTED, OR EXTENDED, AND OF THE SUBSEQUENT LEGISLATION.

EDITED

BY J. BURTON HARRISON,
COUNSELLOR AT LAW.

VOL. III.

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Curtis *ads.* Douglass *et al.*,	V, *N. S.* 112	469
Curtis *ads.* Taylor,	III, *N. S.* 132	40
Curtis *et al. ads.* Martin,	III, *N. S.* 105	33
Cuvillier *ads.* Henry,	III, *N. S.* 524	151
Dalton *ads.* Copell,	IV, *N. S.* 123	249
Dauphin *et al. v.* Soulie,	III, *N. S.* 446	124
Davenport's Heirs *v.* Fortier *et al.*,	III, *N. S.* 695	202
Davenport's Heirs *v.* Fortier *et al.*,	IV, *N. S.* 72	232
Davidson *v.* Milne,	V, *N. S.* 409	597
Davis *ads.* Carruby,	VI, *N. S.* 163	792
Davis *ads.* Curtis,	III, *N. S.* 142	44
Davis *v.* Hampton,	IV, *N. S.* 288	300
Davis *et al. v.* Jewett,	V, *N. S.* 432	608
Davis *et al. v.* Taylor,	IV, *N. S.* 134	252
Davison *v.* Chabre's Heirs,	VI, *N. S.* 317	855
Dawson *et al. ads.* Prudhomme,	III, *N. S.* 161	48
Day and Wife *v.* Thibodeaux,	V, *N. S.* 48	449
Dean *ads.* Arnold,	III, *N. S.* 248	80
De Armas *ads.* McDonough,	VI, *N. S.* 44	737
De Armas *ads.* Morgan,	III, *N. S.* 604	175
Debaillon *v.* Ponsony,	V, *N. S.* 42	449
Debaillon *et al. v.* Ponsony,	VI, *N. S.* 238	824
Deblanc and Wife *ads.* Dumartrait,	V, *N. S.* 38	448
Debon *ads.* Montamat and Wife,	IV, *N. S.* 147	256
Debuys *v.* Mollere,	III, *N. S.* 318	95
Debuys *ads.* Sarapure,	VI, *N. S.* 18	727
Debuys *et al. ads.* Dennistoun *et al.*,	VI, *N. S.* 48	739
Debuys *et al. v.* Johnson,	IV, *N. S.* 286	300
Debuys *et al. v.* Richardson,	IV, *N. S.* 127	250
Declouet *ads.* Broussart,	VI, *N. S.* 250	833
Decoux *ads.* Lewis,	V, *N. S.* 649	694
De Ende *ads.* Nicholl,	III, *N. S.* 310	94
Deflechier's Syndics *ads.* Degruys,	V, *N. S.* 423	603
Degruys *ads.* Dufau,	V, *N. S.* 416	600
Degruys *v.* Deflechier's Syndics,	V, *N. S.* 423	603
Degruys *v.* St. Pe's Creditors,	IV, *N. S.* 404	335
Dejean *ads.* Reels,	V, *N. S.* 76	456
Delahoussaie *v.* Judice,	VI, *N. S.* 251	329
Delalande *v.* Hiriart,	VI, *N. S.* 405	893
Delassize *v.* Cenas *et al.*,	IV, *N. S.* 508	372
Delisle *ads.* Ozanne,	V, *N. S.* 24	445
Dennis *v.* Durnford,	IV, *N. S.* 32	217
Dennison *et al. v.* Nicholson,	IV, *N. S.* 308	304
Dennistoun *et al. v.* Debuys *et al.*,	VI, *N. S.* 48	739
Descahaut's Heirs *ads.* Barbarin,	III, *N. S.* 639	187
Despau *et al. v.* Swindler,	III, *N. S.* 705	206
Destrehan *v.* Destrehan's Executors,	IV, *N. S.* 557	391
Degris *ads.* Pintard *et al.*,	III, *N. S.* 32	12
Dick *v.* Reynolds' Heirs *et al.*,	IV, *N. S.* 525	398
Dick *et al. v* Cash *et al.*,	VI, *N. S.* 45	738
Dick *et al. v.* Chew *et al.*,	VI, *N. S.* 394	888
Dick *et al. v.* Maxwell *et al.*,	VI, *N. S.* 396	889
Dickenson *et al. v.* Boyle,	VI, *N. S.* 100	763
Dicks *et al. v.* Barton,	V, *N. S.* 657	698
Dicks *et al. v.* O'Connor,	V, *N. S.* 547	652
Ditto *v.* Barton,	VI, *N. S.* 127	775
Dix's Estate *ads.* Bird's Syndics,	IV, *N. S.* 254	290
Donaldson *et al. v.* Dorsey *et al.*,	IV, *N. S.* 509	373
Donaldson *et al. v.* Dorsey's Syndics,	V, *N. S.* 654	696
Dorsey *et al. ads.* Donaldson *et al.*,	IV, *N. S.* 509	373

Dorsey's Syndics *ads.* Donaldson,	V, *N. S.* 654	Cond. Ed. 696
Dorsey's Syndics *v.* His Creditors,	V, *N. S.* 399	592
Doucet *v.* Broussart *et al.*,	VI, *N. S.* 196	806
Douglass *et al. v.* Curtis,	V, *N. S.* 112	469
Dow *v.* Shimmin,	IV, *N. S.* 53	226
Downs *v.* Kemper,	V, *N. S.* 106	468
Dreux *v.* His Creditors,	IV, *N. S.* 629	417
Dreux *v.* His Syndics,	III, *N. S.* 239	80
Dreux's Syndics *ads.* Bouthemy's Heirs,	III, *N. S.* 393	107
Dreux's Syndics *ads.* Dreux,	III, *N. S.* 239	80
Dreux's Syndics *ads.* Freret,	IV, *N. S.* 76	233
Dreux's Syndics *ads.* Pilié,	IV, *N. S.* 75	233
Dreux's Syndics *ads.* Saulet,	III, *N. S.* 615	179
Drew *et al. ads.* Sterling,	V, *N. S.* 203	509
Dubourg *et al. ads.* Baudin,	IV, *N. S.* 496	368
Dubreuil *v.* Soulie,	IV, *N. S.* 91, 93	240
Ducros *et al., ads.* Hepp *et al.*,	III, *N. S.* 185	55
Dufau *v.* Degruys,	V, *N. S.* 416	600
Dufau *v.* Massicot's Heirs,	VI, *N. S.* 182	800
Duffy *ads.* Shelmerdine,	IV, *N. S.* 34	319
Duhamel *ads.* Broussart,	III, *N. S.* 11	6
Duhamel *ads.* Melançon's Heirs,	III, *N. S.* 6	4
Duhamel's Executor *ads.* Lartigue,	IV, *N. S.* 664	439
Dumartrait *ads.* Carlin,	V, *N. S.* 20	445
Dumartrait *ads.* Castille,	V, *N. S.* 69	455
Dumartrait *v.* Deblanc and Wife,	V, *N. S.* 38	448
Duncan *et al. ads.* Hicks,	IV, *N. S.* 314	306
Duncan's Executors *v.* Hampton,	VI, *N. S.* 31	732
Duncan's Executors *ads.* Kenner *et al.*,	III, *N. S.* 363	164
Duncan's Executors *ads.* Lafitte,	IV, *N. S.* 622	415
Duncan's Executors *v.* Poydras' Executors,	IV, *N. S.* 359	321
Duncan's Executors *v.* Poydras' Executors,	V, *N. S.* 492	632
Dupau *v.* Richardson,	IV, *N. S.* 181	265
Dupuy *v.* Barlow,	IV, *N. S.* 239	284
Duralde *ads.* Lemos,	III, *N. S.* 258	83
Duralde's Heirs *v.* Guidry,	V, *N. S.* 65	455
Durnford *v.* Aymé,	III, *N. S.* 270	84
Durnford *ads.* Dennis,	IV, *N. S.* 32	217
Dutillet *v.* Dutillet's Syndics,	III, *N. S.* 468	131
Dutillet's Syndics *ads.* Dutillet,	III, *N. S.* 468	131
Eastin *ads.* Banks,	III, *N. S.* 291	90
Eastin *ads.* Hodge,	V, *N. S.* 57	453
Eggleston *v.* Colfax *et al.*,	IV, *N. S.* 481	363
Elkins *v.* Canfield,	V, *N. S.* 505	636
Ellery *ads.* Louisiana State Bank,	IV, *N. S.* 87	239
Elliott *v.* Cox,	V, *N. S.* 286	543
English *v.* Latham,	III, *N. S.* 88	28
Erwin *ads.* Brent,	III, *N. S.* 303	93
Erwin *v.* Fenwick,	VI, *N. S.* 229	820
Erwin *v.* Porter,	VI, *N. S.* 166	793
Erwin *ads.* Pugh,	VI, *N. S.* 159	790
Evans *v.* Nash,	III, *N. S.* 669	193
Exnicios *v.* Weiss,	III, *N. S.* 480	136
Fair *ads.* M'Micken *et al.*,	IV, *N. S.* 152	264
Fanchon *ads.* Macarty,	VI, *N. S.* 116	771
Farrar *v.* M'Cutcheon *et al.*,	IV, *N. S.* 45	223
Faurie *et al. v.* Millaudon *et al.*,	III, *N. S.* 476	134
Fennesey *ads.* Rawle,	V, *N. S.* 11	441
Fennesey *ads.* Rawle,	VI, *N. S.* 206	810
Fenwick *ads.* Erwin,	VI, *N. S.* 229	820
Ferguson *v.* Flower *et al.*,	IV, *N. S.* 312	305
Ferguson *et al. v.* Thomas *et al.*,	III, *N. S.* 75	24

Field *v.* Johnson,	V, *N. S.* 635	Cond. Ed. 690
Finch *et al. ads.* Parquin,	III, *N. S.* 27	11
Finley *v.* Breedlove *et al.*,	IV, *N. S.* 105	244
Fish *ads.* Kling,	IV, *N. S.* 391	333
Fisk *ads.* Gardere,	VI, *N. S.* 387	885
Fisk *v.* Fisk,	IV, *N. S.* 676	434
Fisk *et al. v.* Offit *et al.*,	III, *N. S.* 553	160
Fitz's Syndic *v.* Hayden,	IV, *N. S.* 653	425
Fletcher *ads.* Semple,	III, *N. S.* 382	102
Flood *ads.* Louisiana State Bank,	III, *N. S.* 341	97
Flood *v.* Thomas,	V, *N. S.* 559	658
Flood *et al. v.* Shaumberg,	III, *N. S.* 622	180
Flower *et al. v.* Arnaud,	IV, *N. S.* 73	232
Flower *et al. ads.* Bowman,	III, *N. S.* 641	187
Flower *et al. ads.* Bowman,	V, *N. S.* 407	597
Flower *et al. ads.* Ferguson,	IV, *N. S.* 312	305
Flower *et al. v.* Griffith,	VI, *N. S.* 89	758
Flower *et al. v.* Lane *et al.*,	VI, *N. S.* 151	786
Flower *et al. ads.* Pratt,	III, *N. S.* 452	126
Flower *et al. v.* Swift,	V, *N. S.* 529	645
Fluker *v.* Turner,	IV, *N. S.* 551	389
Fluker *v.* Turner,	V, *N. S.* 707	719
Fogliardi *ads.* Garidel,	IV, *N. S.* 432	343
Ford *v.* Miles,	VI, *N. S.* 377	879
Forstal *et al. v.* Forstal,	III, *N. S.* 367	100
Forstal *et al. ads.* M'Intosh,	III, *N. S.* 571	165
Fortier *ads.* Latorie,	VI, *N. S.* 71	749
Fortier *et al. v.* Davenport's Heirs,	III, *N. S.* 695	202
Fortier *et al. ads.* Davenport's Heirs,	IV, *N. S.* 72	232
Foster *ads.* Lawrence,	IV, *N. S.* 423	342
Foster *v.* Murphy,	V, *N. S.* 79	457
Foucher *et al. ads.* Gardere,	IV, *N. S.* 352	319
Fourgard *v.* Tourregard,	III, *N. S.* 464	130
Fournier *v.* Landreau,	III, *N. S.* 173	52
Fox *v.* Adams,	V, *N. S.* 365	657
Fox *v.* Avart,	VI, *N. S.* 72	750
Franklin Bank *v.* Nolte *et al.*,	IV, *N. S.* 624	416
Fredeau *v.* Grillet,	V, *N. S.* 95	462
Freret *v.* Dreux's Syndics,	IV, *N. S.* 76	233
Freret *ads.* Turnbull,	V, *N. S.* 703	717
Frilot *ads.* Perry,	VI, *N. S.* 217	816
Frique *et al. v.* Hopkins *et al.*,	IV, *N. S.* 212	273
Frisby *v.* Sheridan,	III, *N. S.* 242	80
Furst *et al. ads.* Morgan,	IV, *N. S.* 116	249
Fusilier *v.* Hennen,	V, *N. S.* 71	455
Gadnigo *v.* Roque *et al.*,	V, *N. S.* 86	458
Gague *et al. v.* Gague's Heirs,	III, *N. S.* 172	51
Gague's Heirs *ads.* Gague *et al.*,	III, *N. S.* 172	51
Galloway *v.* Legan,	IV, *N. S.* 167	263
Ganiot *v.* Havard,	VI, *N. S.* 290	844
Gardere *v.* Fisk,	VI, *N. S.* 387	885
Gardere *et al. v.* Foucher *et al.*,	IV, *N. S.* 352	319
Gardere *et al. v.* Murray,	V, *N. S.* 244	526
Garetage *ads.* Hernandez,	IV, *N. S.* 419	342
Garidel *v.* Fogliardi,	IV, *N. S.* 432	343
Garland *v.* Locket,	V, *N. S.* 40	448
Gaster *et al. ads.* Criswell,	V, *N. S.* 129	477
Gaynard *ads.* Adam,	V, *N. S.* 248	528
Gerbeau and Wife *ads.* Perry,	V, *N. S.* 14	442
Gervais *ads.* Overton,	V, *N. S.* 682	710
Gill *v.* Jett,	VI, *N. S.* 279	839
Gill *v.* Philips *et al.*,	VI, *N. S.* 298	847
Gilly *ads.* Young,	III, *N. S.* 504	144
Gilman *v.* Horsely,	V, *N. S.* 661	701

Giraudel *v.* Mendiburne,	III, *N. S.* 509	Cond. Ed. 146
Gireaud *ads.* Breaux,	V, *N. S.* 509	637
Glaze *v.* Russel,	V, *N. S.* 237	523
Goicoechea *v.* Louisiana State Insurance Co.,	VI, *N. S.* 51	740
Gonsoulin's Heirs *v.* Brashears,	V, *N. S.* 38	446
Gonzales *et al. v.* Sanchez *et ux.*,	IV, *N. S.* 657	426
Goodwin *v.* Chesneau's Heirs,	III, *N. S.* 409	110
Goodwin *v.* Chesneau *et al.*,	IV, *N. S.* 103	243
Gould *v.* Bridgers,	III, *N. S.* 692	202
Gravier *ads.* Gravier's Heirs,	III, *N. S.* 206	65
Gravier's Heirs *ads.* Changeur,	IV, *N. S.* 68	230
Gravier's Heirs *v.* Gravier,	III, *N. S.* 206	65
Grafton *v.* Collins's Overseer,	III, *N. S.* 156	48
Gray *v.* Baldwin,	IV, *N. S.* 196	269
Gray *ads.* Baldwin,	IV, *N. S.* 192	271
Gray *ads.* Skipwith *et al.*,	III, *N. S.* 655	190
Green *et al. ads.* Norwood,	V, *N. S.* 177	496
Greig *et al. ads.* Provost and Wife,	V, *N. S.* 87	459
Griffin *ads.* Henderson,	III, *N. S.* 403	109
Griffith *ads.* Flower *et al.*,	VI, *N. S.* 89	758
Griffith *v.* Towles,	VI, *N. S.* 461	833
Griffon *v.* Mayor *et al.*,	V, *N. S.* 279	541
Grillet *ads.* Fredeau,	V, *N. S.* 95	462
Grimball *ads.* Spencer's Heirs,	VI, *N. S.* 355	870
Guibert *v.* Herpen,	III, *N. S.* 395	107
Guidrey *v.* Vives,	III, *N. S.* 659	190
Guidry *ads.* Duralde's Heirs,	V, *N. S.* 65	455
Guirot *v.* Guirot's Syndics,	III, *N. S.* 400	109
Gurlie *et al. v.* Coquet,	III, *N. S.* 498	141
Ham *v.* Herriman,	III, *N. S.* 155	47
Hamilton *v.* Hamilton *et al.*,	VI, *N. S.* 143	783
Hampton *ads.* Buquoy,	VI, *N. S.* 8	723
Hampton *ads.* Davis,	IV, *N. S.* 288	309
Hampton *ads.* Duncan's Executors,	VI, *N. S.* 31	732
Hampton *ads.* Police Jury,	V, *N. S.* 389	588
Hampton *ads.* Wall,	IV, *N. S.* 310	305
Harding's Heirs *ads.* Saunders,	V, *N. S.* 62	454
Hargrove *ads.* Milligan's Heirs,	VI, *N. S.* 337	861
Harman *ads.* Wright,	V, *N. S.* 235	522
Harrathy *ads.* Smith,	V, *N. S.* 319	559
Harris's Tutor *v.* M'Kee *et al.*,	IV, *N. S.* 485	365
Harrison and Wife *ads.* Arpine's Heirs,	VI, *N. S.* 326	860
Havard *ads.* Cohen,	V, *N. S.* 312	513
Havard *ads.* Ganiot,	VI, *N. S.* 290	844
Havard *ads.* King *et al.*,	V, *N. S.* 193	504
Havard *ads.* Stone,	V. *N. S.* 126	475
Hawkins *v.* Vanwinkle,	VI, *N. S.* 418	897
Hawkins's Heirs *ads.* United States *et al.*,	IV, *N. S.* 317	308
Hayden *ads.* Fitz's Syndic,	IV, *N. S.* 653	425
Hazard *v.* Boyd,	IV, *N. S.* 347	319
Hazelton *ads.* Baldwin,	III, *N. S.* 61	21
Henderson *v.* Beale's Curator,	IV, *N. S.* 228	279
Henderson *v.* Bowles,	III, *N. S.* 152	46
Henderson *ads.* Campbell,	III, *N. S.* 152	46
Henderson *v.* Griffin,	III, *N. S.* 403	109
Henderson *ads.* Holstein,	VI, *N. S.* 271	835
Henderson *et al. ads.* Boatner,	V, *N. S.* 186	500
Henderson *et al. v.* Morgan,	IV, *N. S.* 649	423
Hennen *ads.* Fusilier,	V, *N. S.* 71	455
Hennen *v.* Louisiana State Bank,	IV, *N. S.* 226	279
Hennen *ads.* Miller,	III, *N. S.* 587	168
Hennen *v.* Monro,	IV, *N. S.* 449	350
Hennen *ads.* Woodrow,	VI, *N. S.* 156	789

Henry *v.* Cuvillier,	III, *N.S.* 524	Cond. Ed. 151
Henry *ads.* Hyde *et al.*,	III, *N. S.* 179	54
Henry *ads.* Hyde *et al.*,	IV, *N. S.* 51	225
Henry *ads.* Hyde *et al.*,	V, *N. S.* 636	689
Hepp *et al. v.* Ducross *et al.*,	III, *N. S.* 185	55
Hepp *et al. v.* Lafonta's Executors,	IV, *N. S.* 428	344
Herman *v.* Sprigg,	III, *N. S.* 190	58
Herman *v.* Smith,	VI, *N. S.* 161	791
Hernandez *v.* Garetage,	IV, *N. S.* 419	342
Herriman *ads.* Ham,	III, *N. S.* 155	47
Herpin *ads.* Guibert,	III, *N. S.* 395	107
Herring *v.* Levy,	IV, *N. S.* 383	330
Herriot *et al. v.* Broussard,	IV, *N. S.* 260	290
Hervey *et al. v.* Russel,	III, *N. S.* 59	21
Hesser *v.* Black *et al.*,	V. *N. S.* 96	463
Hewlet *ads.* Barfield,	VI, *N. S.* 78	752
Hickey *et al. ads.* Whitehurst,	III, *N. S.* 589	169
Hickey *et al. ads.* Turner,	III, *N. S.* 256	82
Hicks *v.* Duncan *et al.*,	IV, *N. S.* 314, 497	306, 369
Hill *v.* Morgan,	IV, *N. S.* 475	360
Hiriart *ads.* Delalande,	VI, *N. S.* 405	892
Hiriart *ads.* Poydras,	VI, *N. S.* 403	891
Hodge *v.* Eastin,	V, *N. S.* 57	453
Hollander *ads.* Taylor,	IV, *N. S.* 535	382
Hollander *ads.* Taylor,	V, *N. S.* 295	548
Holliday *v.* M'Culloch *et al.*,	III, *N. S.* 176	53
Holstein *v.* Henderson,	VI, *N. S.* 271	835
Hood *et al. v.* Purdy *et al.*,	V, *N. S.* 626	686
Hook's Heirs *ads.* Hughes,	VI, *N. S.* 323	858
Hooper *ads.* Williams,	IV, *N. S.* 176	264
Hooter's Heirs *v.* Tippet,	V, *N. S.* 100	469
Hope Insurance Co. *ads.* Cornell and Wife,	III, *N. S.* 223	73
Hopkins *et al. ads.* Frique *et al.*,	IV, *N. S.* 212	273
Horseley *ads.* Gilman,	V, *N. S.* 661	701
Horton *ads.* Williams *et al.*,	IV, *N. S.* 464	357
Howard *ads.* Boyd *et al.*,	III, *N. S.* 286	88
Howard *ads.* Boyd *et al.*,	IV, *N. S.* 178	265
Howe's Heirs *v.* Brent,	VI, *N. S.* 248	828
Hughes *v.* Hook's Heirs,	VI, *N. S.* 323	858
Hunt *ads.* Marigny,	III, *N. S.* 651	189
Hunt *et al. ads.* Postlethwaite,	V, *N. S.* 89	460
Hunter *v.* Smith,	III, *N. S.* 109	35
Hunter *v.* Smith,	V, *N. S.* 164, 177	491, 497
Hunter *v.* Smith,	VI, *N. S.* 351	868
Hunter *v.* Wells,	V, *N. S.* 119	472
Hunter *ads.* Wells,	VI, *N. S.* 311	852
Hyde *et al. v.* Henry,	III, *N. S.* 179	54
Hyde *et al. v.* Henry,	IV, *N. S.* 51	225
Hyde *et al. ads.* Henry,	V, *N. S.* 633	689
Inerarity *et al. ads.* Johnson *et al.*,	IV, *N. S.* 10	212
Ingram *ads.* Saunders,	V, *N. S.* 644	692
Ingrem *v.* Ingrem,	III, *N. S.* 369	100
Innis *v.* Kemper,	III, *N. S.* 119	38
Innis *v.* Ware,	III, *N. S.* 117	38
Ireland *v.* Bryan,	III, *N. S.* 515	148
Irwin *v.* Robb,	V, *N. S.* 34	458
Jacobs *ads.* Bedford *et al.*,	IV, *N. S.* 528	379
Jacobs *ads.* Bedford *et al.*,	V, *N. S.* 448	614
James *ads.* Bell,	VI, *N. S.* 74	750
Jenkins *v.* Tyler,	III, *N. S.* 182	55
Jett *ads.* Gill,	VI, *N. S.* 279	839
Jewel *v.* Andrews,	V, *N. S.* 566	661

Jewett *v.* Davis,	V, *N. S.* 43	Cond. Ed. 608
Johns *ads.* Leblanc,	IV, *N. S.* 635	419
Johnson *v.* Bell *et al.*,	VI, *N. S.* 384	883
Johnson *ads.* Debuys *et al.*,	IV, *N. S.* 286	300
Johnson *v.* Field,	V, *N. S.* 635	690
Johnson *v.* Kirkland,	V, *N. S.* 182	500
Johnson *v.* Kirkland *et. al.*,	VI, *N. S.* 344	864
Johnson *ads.* United States Bank,	V, *N. S.* 310	555
Johnson *et al. v.* Brown,	III, *N. S.* 601	174
Johnson *et al. v.* Inerarity *et al.*,	IV, *N. S.* 10	212
Johnson *et al. v.* Sterling,	III, *N. S.* 483	137
Johnson *et al. ads.* Tabor,	III, *N. S.* 674	194
Johnson and Wife *ads.* Sterling,	V, *N. S.* 362	578
Johnson's Syndics *ads.* Marigny,	III, *N. S.* 551	160
Jones *ads.* Shimmin,	V, *N. S.* 463	619
Jones *ads.* Skillman,	III, *N. S.* 686	199
Jordan *v.* White,	IV, *N. S.* 335, 626	315, 416
Judice *v.* Brent,	VI, *N. S.* 226	820
Judice *ads.* Delahoussaie,	VI, *N. S.* 251	829
Judge of Jefferson *ads.* Millaudon,	VI, *N. S.* 24	730
Kemper *ads.* Downs,	V, *N. S.* 106	468
Kemper *ads.* Innis,	III, *N. S.* 119	38
Kennedy *ads.* Parish of Orleans,	IV, *N. S.* 511	373
Kenner *et al. ads.* Butler,	III, *N. S.* 257	83
Kenner *et al. v.* Butler,	III, *N. S.* 388	105
Kenner *et al. v.* Duncan's Executors,	III, *N. S.* 363	164
Kenner's Syndics *v.* Sims,	VI, *N. S.* 66	748
Kimble *ads.* Woods,	V, *N. S.* 246	526
Kinchen *et al. ads.* Roberts,	V, *N. S.* 416	602
King *et al. v.* Havard,	V, *N. S.* 193	504
Kirkland *ads.* Johnson,	V, *N. S.* 182	500
Kirkland *ads.* Johnson,	VI, *N. S.* 344	864
Kling *v.* Fish,	IV, *N. S.* 391	333
Knight *ads.* Reels,	V, *N. S.* 9	440
Labarre *v.* Lambert,	III, *N. S.* 300	91
Labolais *v.* Bernard,	VI, *N. S.* 206	810
Lacroix *v.* Coquet,	V, *N. S.* 537	644
Lacroix *v.* Menard,	III, *N. S.* 339	97
Lacroix *v.* Menard,	VI, *N. S.* 98	763
Lacy *ads.* Skillman and Wife,	V, *N. S.* 50	450
Lafarge *v.* Patterson,	V, *N. S.* 669	705
Lafarge *v.* Ripley,	IV, *N. S.* 303	304
Lafitte *v.* Duncan,	IV, *N. S.* 622	415
Lafon's Heirs *v.* His Ex'rs,	III, *N. S.* 707	206
Lafonta *v.* Poulte,	VI, *N. S.* 391	887
Lafonta's Ex'rs *ads.* Hepp *et al.*,	IV, *N. S.* 428	342
Laine *et al. ads.* Babin,	IV, *N. S.* 611	412
Lambert *ads.* Labarre,	III, *N. S.* 300	91
Lambert *ads.* Spencer,	IV, *N. S.* 366	323
Lanaux's Syndics *ads.* Treme,	IV, *N. S.* 230	280
Landreau *ads.* Fournier,	III, *N. S.* 173	52
Landry *v.* Broussard,	VI, *N. S.* 204	809
Landry *ads.* Laporte,	IV, *N. S.* 125	250
Landry *ads.* Laporte,	V, *N. S.* 359	576
Lane *et al. ads.* Flower,	VI, *N. S.* 151	786
Lanna *ads.* Lanusse,	VI, *N. S.* 103	765
Lanusse *v.* Lanna,	VI, *N. S.* 103	765
Lanusse's Syndics *v.* Pimpinella,	IV, *N. S.* 439	346
Lanusse's Syndics *v.* Pimpinella,	VI, *N. S.* 124	774
Laporte *v.* Landry,	IV, *N. S.* 125	250
Lartigue *et al. v.* Duhamel's Ex'r,	IV, *N. S.* 664	430
Latham *ads.* English,	III, *N. S.* 88	28

Latiolais *v.* Richard,	VI, *N. S.* 213	Cond. Ed. 814
Latorre *v.* Fortier,	VI, *N. S.* 71	749
Lauve *ads.* St. Francis's Church,	III, *N. S.* 62	22
Lawes *et al. v.* Chinn,	IV, *N. S.* 388	332
Lawrence *v.* Foster,	IV, *N. S.* 423	342
Layton *et al. ads.* Martinez,	IV, *N. S.* 368	324
Leblanc *v.* Johns,	IV, *N. S.* 635	419
Leblanc *et al. v.* Viator *et al.*,	VI, *N. S.* 253	830
Le Breton *v.* Morgan,	IV, *N. S.* 138	253
Lefebvre *ads.* Malchaux,	IV, *N. S.* 489	366
Legan *ads.* Galloway,	IV, *N. S.* 167	263
Lemos v. Duraldo,	III, *N. S.* 258	83
L'Eglise *v.* Creditors,	IV, *N. S.* 238	283
L'Eglise *ads.* Turcas,	IV, *N. S.* 462	357
Lespinasse *ads.* Bernardine,	VI, *N. S.* 94	761
Levesque *v.* Anderson,	VI, *N. S.* 293	846
Levy *ads.* Herring,	IV, *N. S.* 363	330
Lewis *v.* Decoux,	V, *N. S.* 649	694
Lewis *v.* Peytavin,	IV, *N. S.* 4	209
Lincoln *et al. v.* Visoso,	III, *N. S.* 325	96
Linton *et al. ads.* Thompson,	V, *N. S.* 261	533
Litchworth *v.* Bartell *et al.*,	IV, *N. S.* 136	252
Littlejohn *v.* Ramsay,	IV, *N. S.* 655	425
Livaudais *ads.* Mathurin,	V, *N. S.* 303	551
Livermore *v.* Morgan's Syndics,	VI, *N. S.* 134	778
Livermore *ads.* Poignan,	V, *N. S.* 321	561
Livingston *ads.* Ramsay,	VI, *N. S.* 15	725
Livingston *v.* Waldron,	IV, *N. S.* 456	353
Lobau *ads.* Allard *et al.*,	III, *N. S.* 293	90
Lobre *ads.* Pointe,	V, *N. S.* 443	612
Loccard *v.* Bullet,	III, *N. S.* 170	51
Locket *ads.* Garland,	V, *N. S.* 40	448
Louisiana Insurance Co. *ads.* Brooke *et al.*,	V, *N. S.* 530	645
Louisiana Insurance Co. *ads.* Campbell,	VI, *N. S.* 131	777
Louisiana Insurance Co. *ads.* Cucullu,	V, *N. S.* 464	620
Louisiana State Bank *ads.* Canonge,	III, *N. S.* 344	97
Louisiana State Bank *v.* Ellery,	IV, *N. S.* 87	239
Louisiana State Bank *v.* Flood,	III, *N. S.* 341	97
Louisiana State Bank *v.* Hennen,	IV, *N. S.* 226	279
Louisiana State Bank *v.* Morgan *et al.*,	IV, *N. S.* 344	318
Louisiana State Bank *ads.* O'Brian,	V, *N. S.* 305	553
Louisiana State Insurance Co. *ads.* Brooke *et al.*,	IV, *N. S.* 640	420
Louisiana State Insurance Co. *ads.* Cassidy,	VI, *N. S.* 421	899
Louisiana State Insurance Co. *ads.* Goicoechea,	VI, *N. S.* 51	740
Louisiana State Ins. Co. *v.* Lou. State Bank,	III, *N. S.* 610	177
Louisiana State Insurance Co. *ads.* Mellon,	V, *N. S.* 563	659
Louisiana State Insurance Co. *ads.* Mellon,	VI, *N. S.* 424	700
Louisiana State Insurance Co. *ads.* Nelson,	V, *N. S.* 380	545
Louisiana State Insurance Co. *ads.* Osacar,	V, *N. S.* 386	587
Louisiana State Insurance Co. *ads.* Poutz,	IV, *N. S.* 80	236
Ludeling *v.* Creditors,	IV, *N. S.* 601	408
Ludeling's Syndics *v.* Poydras's Ex'rs,	IV, *N. S.* 637	419
Macartey *v.* Fanchon,	VI, *N. S.* 116	771
M'Clintock *et al. v.* Cairnes *et al.*,	V, *N. S.* 450	615
M'Coy *v.* Creditors,	IV, *N. S.* 67	229
M'Crummin *v.* M'Crummin,	V, *N. S.* 158	489
M'Crummin *et al. v.* Collins *et al.*,	III, *N. S.* 166	50
M'Culloch *et al. ads.* Holliday,	III, *N. S.* 176	53
M'Cutcheon *et al. ads.* Farrar,	IV, *N. S.* 45	223
M'Donogh *v.* De Armas *et al.*,	VI, *N. S.* 44	737
M'Donogh *v.* Rogers,	VI, *N. S.* 212	813
M'Donogh *et al. ads.* Parkinson,	IV, *N. S.* 246	287
M'Intosh *v.* Forstal *et al.*,	III, *N. S.* 571	165

M'Kee *et al. ads.* Harris's Tutor,	IV, *N. S.* 485	Cond. Ed. 365
Mackey *v.* Trustees *et al.*,	III, *N. S.* 390	105
M'Micken *v.* Bird,	IV, *N. S.* 514	639
M'Micken *v.* Brown,	VI, *N. S.* 85	756
M'Micken *v.* Brent,	VI, *N. S.* 249	829
M'Micken *v.* Fair,	IV, *N. S.* 172	264
M'Micken *v.* Smith *et al.*,	V, *N. S.* 427	605
M'Neil's Heirs *ads.* Styles,	VI, *N. S.* 296	847
M'Nutt *v.* Boyce,	VI, *N. S.* 308	851
M'Nutt *et al. ads.* Bacon,	III, *N. S.* 129	39
M'Rae *v.* Bushnell,	IV, *N. S.* 483	364
Maher *et al.* Canfield *et al.*,	IV, *N. S.* 174	264
Malchaux *v.* Lefebvre,	IV, *N. S.* 489	366
Manzenal *et al. ads.* Cucullu,	IV, *N. S.* 183	265
Marburg *v.* Canfield,	IV, *N. S.* 539	383
Marc *v.* Church of St. Martin,	V, *N. S.* 5	438
Marigny *v.* Hunt,	III, *N. S.* 651	189
Marigny *v.* Johnson's Syndics,	III, *N. S.* 551	160
Marigny *v.* Remy,	III, *N. S.* 607	176
Mark *v.* Bowers,	IV, *N. S.* 95	241
Marquand *et al. ads.* Wakeman,	V, *N. S.* 265	535
Martel *et al. v.* Turcaud,	VI, *N. S.* 118	771
Martial *v.* Cotterel,	V, *N. S.* 275	538
Martin *v.* Curtis *et al.*,	III, *N. S.* 105	33
Martin *v.* Martin,	V, *N. S.* 107	468
Martin *v.* Martin's Heirs,	III, *N. S.* 48	19
Martin *v.* Martin's Heirs *et al.*,	V, *N. S.* 165	492
Martin *v.* Reeves *et al.*,	III, *N. S.* 22	9
Martin *v.* Rutherford *et al.*,	VI, *N. S.* 281	840
Martin's Heirs *ads.* Martin,	III, *N. S.* 48	19
Martin's Heirs *ads.* Rutherford's Heirs,	III, *N. S.* 63	22
Martinez *v.* Layton *et al.*,	IV, *N. S.* 368	324
Masse's Heirs *v.* Pierre *et al.*,	VI, *N. S.* 263	834
Massicott's Heirs *ads.* Dufau,	VI, *N. S.* 182	800
Mathurin *v.* Livaudais,	V, *N. S.* 303	551
Matossy *ads.* Sacerdotte,	IV, *N. S.* 26	214
Maxey's Heirs *ads.* Scrivener,	VI, *N. S.* 317	855
Maxwell *et al. ads.* Dick *et al.*,	VI, *N. S.* 396	889
Mayner *v.* Rollins,	III, *N. S.* 618	179
Mayor *et al. ads.* Griffin,	V, *N. S.* 279	541
Mayor *et al. v.* Paulding,	IV, *N. S.* 189, 614	267, 413
Mayor *et al. v.* Peyroux,	VI, *N. S.* 155	788
Melancon's Heirs *v.* Duhamel,	III, *N. S.* 7	4
Mellon *v.* Bucks *et al.*,	V, *N. S.* 371	580
Mellon *v.* Croghan,	III, *N. S.* 432	116
Mellon *v.* Louisiana State Insurance Co.,	V, *N. S.* 563	659
Mellon *v.* Louisiana State Insurance Co.,	VI, *N. S.* 240	900
Menard *ads.* Lacroix,	III, *N. S.* 339	97
Menard *ads.* Lacroix,	VI, *N. S.* 98	763
Mendiburne *ads.* Giraudel,	III, *N. S.* 509	146
Meriam *et al. v.* Worsham *et al.*,	IV, *N. S.* 198	271
Mercier *et al. ads.* Miller *et al.*,	III, *N. S.* 229	75, 78
Meynard's Syndics *v.* Pierce *et al.*,	III, *N. S.* 375	101
Miles *ads.* Ford,	VI, *N. S.* 377	879
Miles *ads.* Oden *et al*,	VI, *N. S.* 211	813
Millaudon *v.* Arnous *et al.*,	III, *N. S.* 596	172
Millaudon *v.* Judge of Jefferson,	VI, *N. S.* 24	730
Millaudon *v.* Percy *et al.*,	V, *N. S.* 551	654
Millaudon *v.* Soubercase,	III, *N. S.* 287	88
Millaudon *ads.* Zoit,	IV, *N. S.* 470	359
Millaudon *et al. v.* Faurin *et al.*,	III, *N. S.* 476	134
Miller *ads.* Campbell,	III, *N. S.* 149	46
Miller *ads.* Catholic Church,	V, *N. S.* 101	465
Miller *v.* Hennen,	III, *N, S.* 587	168

Miller *v.* Morgan,	VI, *N. S.* 86	Cond. Ed. 757
Miller *ads.* Myles,	IV, *N. S.* 492	367
Miller *v.* Pierce,	III, *N. S.* 584	87
Miller *ads.* Pierce,	III, *N. S.* 354	99
Miller *v.* Reynolds *et al.*,	V, *N. S.* 665	702
Miller *et al. v.* Mercier *et al.*,	III, *N. S.* 229	75
Milligan's Heirs *v.* Hargrove,	VI, *N. S.* 337	861
Milne *v.* Davidson,	V, *N. S.* 409	597
Mississippi Insurance Co. *ads.* Akin *et al.*,	IV, *N. S.* 661	428
Mitchel *ads.* Morgan,	III, *N. S.* 576	166
Michel *v.* Owens,	V, *N. S.* 667	704
Mitchel *et al. v.* White *et al.*,	VI, *N. S.* 407	894
Mollere *ads.* Debuys,	III, *N. S.* 318	95
Mollere *ads.* Pilie,	IV, *N. S.* 42	221
Monro *ads.* Hennen,	IV, *N. S.* 449	350
Montamat *et ux. v.* Debon,	IV, *N. S.* 147	256
Montillet *v.* Shiff,	IV, *N. S.* 83	237
Moosa *v.* Allain,	IV, *N. S.* 99	243
Morgan *ads.* Applegate,	V, *N. S.* 642	691
Morgan *ads.* Beon,	V, *N. S.* 701	716
Morgan *ads.* Carraby *et al.*,	V, *N. S.* 499	635
Morgan *ads.* De Armas,	III, *N. S.* 604	175
Morgan *v.* Furst *et al.*,	IV, *N. S.* 116	249
Morgan *ads.* Le Breton,	IV, *N. S.* 138	253
Morgan *ads.* Louisiana State Bank,	IV, *N. S.* 344	318
Morgan *ads.* Henderson *et al.*,	IV, *N. S.* 649	423
Morgan *ads.* Hill,	IV, *N. S.* 475	360
Morgan *ads.* Miller,	VI, *N. S.* 86	757
Morgan *v.* Mitchell,	III, *N. S.* 576	176
Morgan *ads.* Parish of Orleans,	VI, *N. S.* 3	721
Morgan *ads.* Richard *et al.*,	IV, *N. S.* 89	239
Morgan *ads.* Strong,	V, *N. S.* 144	483
Morgan *ads.* Vawter,	VI, *N. S.* 46	738
Morgan *ads.* Villars,	III, *N. S.* 529	153
Morgan *et al. ads.* Thorn *et al.*,	IV, *N. S.* 292	302
Morgan *et al. ads.* Creditors,	VI, *N. S.* 409	894
Morgan *et al. ads.* Strong,	VI, *N. S.* 336	861
Morgan's Syndics *ads.* Livermore,	VI, *N. S.* 134	778
Morgan's Syndics *ads.* Peet *et al.*,	VI, *N. S.* 137	780
Moulon *v.* Creditors,	IV, *N. S.* 29	216
Mulhollan *v.* Voorhies,	III, *N. S.* 46	18
Mulhollan *ads.* Voorhies,	III, *N. S.* 70	23
Murdoch *v.* Browder,	V, *N. S.* 677	708
Murphee *ads.* Parham,	IV, *N. S.* 355	319
Murphy *ads.* Foster,	V, *N. S.* 79	416
Murphy *ads.* Prudhomme,	V, *N. S.* 90	460
Murray *ads.* Gardere *et al.*,	V, *N. S.* 244	526
Miles *v.* Miller,	IV, *N. S.* 492	367
Naba *v.* Carlin,	III, *N. S.* 373	101
Naba *v.* Soubercase's Heirs,	IV, *N. S.* 493	368
Nancarrow *v.* Weathersbee,	VI, *N. S.* 347	866
Nash *ads.* Evans,	III, *N. S.* 669	193
Natchitoches' Trustees *v.* Coe,	III, *N. S.* 140	44
Nelson *v.* Louisiana State Insurance Co.,	V, *N. S.* 389	545
Nichol *v.* De Ende,	III, *N. S.* 310	94
Nicholson *ads.* Denison *et al.*,	IV, *N. S.* 308	304
Nolan *ads.* Richards,	III, *N. S.* 336	96
Nolan *v.* Rogers,	IV, *N. S.* 145	255
Nolan *ads.* White *et al.*,	III, *N. S.* 636	186
Nolte *v.* Creditors,	VI, *N. S.* 168	794
Nolte *et al. ads.* Franklin Bank,	IV, *N. S.* 624	416
Nolte's Syndics *v.* Abat,	V, *N. S.* 697	714
Norwood *v.* Green *et al.*,	V, *N. S.* 174	496

Nott *ads.* Robertson,	III, *N. S.* 268	Cond. Ed. 84
Noyrell *ads.* Pavie,	V, *N. S.* 92	461
Nuley *et al. ads.* Crocker,	III, *N. S.* 583	167
Oakley *ads.* Clay,	V, *N. S.* 137	480
Oakley *v.* Phillips,	VI, *N. S.* 306	851
Oakley *et al. v.* Russell *et al.*,	VI, *N. S.* 58	744
O'Brien *v.* Louisiana State Bank,	V, *N. S.* 305	553
Oden *et al. ads.* Miles,	VI, *N. S.* 211	813
O'Conner *ads.* Dick *et al.*,	V, *N. S.* 547	652
Oddie *ads.* Clark,	IV, *N. S.* 625	416
Offit *et al. ads.* Fisk *et al.*,	III, *N. S.* 553	160
Oldham *ads.* Clay,	III, *N. S.* 276	87
Oldham *v.* Croghan,	III, *N. S.* 517	148
Orleans Ins. Co. *ads.* Cucullu,	V, *N. S.* 492	631
Orleans Ins. Co. *ads.* Cucullu,	VI, *N. S.* 11	723
Orleans Ins. Co. *ads.* Zacharie,	V, *N. S.* 637	690
Orleans, Parish of *v.* Kennedy,	IV, *N. S.* 511	373
Orleans, Parish of *v.* Morgan,	VI, *N. S.* 3	721
Ory *v.* Winter,	IV, *N. S.* 277	296
Ossacar *v.* Louisiana State Ins. Co.,	V, *N. S.* 386	587
Overton *v.* Archinaud,	V, *N. S.* 207	511
Overton *v.* Gervais,	V, *N. S.* 682	710
Owens *v.* Mitchell,	V, *N. S.* 667	704
Ozanne *v.* Delisle,	V, *N. S.* 24	445
Parham *v.* Murphee,	IV, *N. S.* 355	319
Parker *ads.* Simmons,	IV, *N. S.* 200	272
Parkins *et al. v.* Campbell,	V, *N. S.* 149	485
Parkinson *et al. v.* M'Donough *et al.*,	IV, *N. S.* 246	287
Parquin *v.* Finch *et al.*,	III, *N. S.* 27	11
Pascal *v.* Caldwell,	III, *N. S.* 175	53
Patin *v.* Poydras's Ex'rs,	V, *N. S.* 639	691
Patterson *ads.* Compton *et al.*,	III, *N. S.* 164	50
Patterson *v.* Lafarge,	V, *N. S.* 669	705
Patterson *v.* Philpot,	V, *N. S.* 273	538
Paulding *ads.* Corporation,	IV, *N. S.* 189, 614	267, 413
Paxton *ads.* Phillips *et al.*,	III, *N. S.* 39	15
Pavie *v.* Noyrel,	V, *N. S.* 92	461
Peet *et al. v.* Morgan,	VI, *N. S.* 137	780
Penniman *ads.* Babcock,	V, *N. S.* 651	695
Percy *ads.* Shepherd,	IV, *N. S.* 267	294
Percy *et al. ads.* Millaudon,	V, *N. S.* 550	654
Perry *v.* Bellicore,	V, *N. S.* 78	456
Perry *v.* Frilot,	VI, *N. S.* 217	816
Perry *v.* Gerbeau and Wife,	V, *N. S.* 14	442
Perry *v.* Williams,	V, *N. S.* 694	713
Peyroux *ads.* Mayor *et al.*,	VI, *N. S.* 155	788
Peytavin *ads.* Lewis,	IV, *N. S.* 4	209
Phelps *et al. v.* Overton,	VI, *N. S.* 309	852
Philips *v.* Broussard,	VI, *N. S.* 309	852
Philips *ads.* Oakley,	VI, *N. S.* 306	851
Philips *v.* Paxton *et al.*,	III, *N. S.* 39	15
Phlips *et al. ads.* Gill,	VI, *N. S.* 298	847
Philpot *v.* Patterson,	V, *N. S.* 273	538
Pierce *ads.* Meynard's Syndics,	III, *N. S.* 375	101
Pierce *v.* Miller,	III, *N. S.* 354	99
Pierce *ads.* Miller,	III, *N. S.* 284	87
Pierce *ads.* Watson *et al.*,	VI, *N. S.* 416	897
Pierre *et al. ads.* Masse's Heirs,	VI, *N. S.* 263	834
Pigeau *et al. v.* Commeau,	IV, *N. S.* 190	268
Pigneguy *ads.* Bigelow,	V, *N. S.* 367	581
Pilié *v.* Molleré,	IV, *N. S.* 42	221
Pilié *v.* Dreux's Syndics,	IV, *N. S.* 75	233

Pimpinella *ads.* Lanusse's Syndics,	IV, *N. S.* 439	Cond. Ed. 346
Pimpinella *ads.* Lanusse's Syndics,	VI, *N. S.* 124	774
Pintard *et al. v.* Degris,	III, *N. S.* 32	12
Plauche *v.* Plauche,	III, *N. S.* 463	129
Pleasants *et al. ads.* Botts,	V, *N. S.* 127	476
Poignan *v.* Livermore,	V, *N. S.* 321	561
Pointz *v.* Lobre,	V, *N. S.* 443	612
Police Jury *v.* Hampton,	V, *N. S.* 389	588
Police Jury *v.* Reeves,	VI, *N. S.* 221	817
Ponsony *ads.* Debaillon	V, *N. S.* 42	449
Ponsony *ads.* Debaillon *et al.*,	VI, *N. S.* 238	824
Ponsony *ads.* Rizat *et al.*,	VI, *N. S.* 212	813
Porter *ads.* Erwin,	VI, *N. S.* 166	793
Postlethwaite *v.* Hunt *et al.*,	V, *N. S.* 39	460
Poultz *ads.* Lafonta,	VI, *N. S.* 391	887
Poutz *v.* Louisiana State Ins. Co.,	IV, *N. S.* 80	236
Powers *ads.* Bonne *et al.*,	III, *N. S.* 458	127
Poydras *ads.* Abadie,	VI, *N. S.* 26	730
Poydras *v.* Hiriart,	VI, *N. S.* 403	891
Poydras's Ex'rs *ads.* Duncan's,	VI, *N. S.* 359	321
Poydras's Ex'rs *ads.* Duncan's,	V, *N. S.* 492	632
Poydras's Ex'rs *ads.* Ludeling's Syndics,	IV, *N. S.* 637	419
Poydras's Ex'rs *ads.* Patin,	V, *N. S.* 639	691
Pratt *v.* Flower *et al.*,	III, *N. S.* 452	126
Prentice *et al. v.* Waters,	III, *N. S.* 522	150
Preach *ads.* Cecil,	IV, *N. S.* 256	290
Price *et al. ads.* Williamson,	IV, *N. S.* 399	333
Priou *v.* Adams,	V, *N. S.* 692	711
Provost and Wife *v.* Greig *et al.*,	V, *N. S.* 87	459
Prudhomme *v.* Dawson *et al.*,	III, *N. S.* 161	48
Prudhomme *v.* Murphy,	V, *N. S.* 90	460
Pugh *v.* Erwin,	VI, *N. S.* 149	790
Purdy *et al. v.* Hood *et al.*,	V, *N. S.* 626	686
Raby *ads.* Williams,	III, *N. S.* 703	206
Ramsey *ads.* Bonnet *et al.*,	VI, *N. S.* 129	776
Ramsay *ads.* Littlejohn,	IV, *N. S.* 655	425
Ramsay *v.* Livingston,	VI, *N. S.* 15	725
Randal *v.* Bayon,	IV, *N. S.* 132	251
Rawle *v.* Fennessey,	V, *N. S.* 11	441
Rawle *v.* Fennessey,	VI, *N. S.* 206	810
Reels *v.* Knight,	V, *N. S.* 9	440
Rees *v.* Dejean,	V, *N. S.* 76	456
Reeves *ads.* Police Jury,	VI, *N. S.* 221	817
Reeves *et al. ads.* Martin,	III, *N. S.* 22	9
Reeves *et al. v.* Burton *et al.*,	VI, *N. S.* 283	841
Remy *ads.* Merigny,	III, *N. S.* 607	176
Reynolds *v.* Buford,	III, *N. S.* 35	13
Reynolds *ads.* Miller,	V, *N. S.* 665	702
Reynolds *v.* Thomas,	V, *N. S.* 152	487
Reynolds's Heirs *et al. ads.* Dick,	IV, *N. S.* 525	378
Richard *ads.* Latiolais,	VI, *N. S.* 213	814
Richards *v.* Creditors,	V, *N. S.* 298	550
Richard *v.* Nolan *et al.*,	III, *N. S.* 336	96
Richards *et al. v.* Morgan,	IV, *N. S.* 39	239
Richardson *v.* Debruys *et al.*,	IV, *N. S.* 127	250
Richardson *ads.* Dupan,	IV, *N. S.* 181	265
Richardson *et al. v.* Weston,	IV, *N. S.* 244	286
Rieffel *et al. v.* Boissiere,	IV, *N. S.* 366	322
Ripley *ads.* Lafarge,	IV, *N. S.* 303	304
Ritchie *v.* Wilson,	III, *N. S.* 585	167
Rizat *et al. v.* Ponsony,	VI, *N. S.* 212	813
Robb *ads.* Irwin,	V, *N. S.* 84	458
Robert *v.* Crain,	III, *N. S.* 144, 145	45

Robert *v.* Tanner,	V, *N. S.* 254	Cond. Ed. 530
Roberts *v.* Kinchen *et al.*,	V, *N. S.* 416	602
Roberts *v.* Rodes,	III, *N. S.* 100	32
Robertson *v.* Nott,	III, *N. S.* 268	84
Robins *v.* Weeks,	V, *N. S.* 379	584
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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Louisiana.

WESTERN DISTRICT, AUGUST TERM, 1824.

(CONTINUED.)

Abercrombie *v.* Caffray *et al.* III, N. S. 1.

A widow left in necessitous circumstances, when her husband died rich, is entitled to the marital portion, although she was married and resided out of Louisiana, and her husband died out of this state.

FIFTH District.

PORTER, J., delivered the opinion of the court.

The petitioner, widow of the late Lyman Harding, claims from his son and heir by a former marriage, the *marital portion*, on an allegation that she brought no dowry, and that she has been left in necessitous circumstances although her husband died rich.

The marriage was contracted in the state of Massachusetts. The domicil of the husband being at the time in the state of Mississippi, and continued so until his decease.

Two questions have been raised in argument. 1. Is the plaintiff entitled to the *marital portion?* 2. If she be, whether she should take the usufruct, or the full property of the fourth part of the estate?

The difficulty of deciding the first question, arises from the conflict of two general, and well established principles of jurisprudence.

The plaintiff contends, that real estate on the death of the owner, must be distributed according to the laws of the country where it is situated.

The defendants urge, that it is in virtue of the contract of marriage

the plaintiff can have any claim on the estate, and that this contract must be governed by the laws of the husband's domicil.

We think the rule first mentioned must prevail. The law speaks generally of the wife, without distinguishing, whether she be domiciled in this state or not. It admits a foreign heir to take the property, and we are unable to see why it should reject the widow, who is a stranger, for her portion. It is true, that in virtue of a contract made in another country she obtained the quality of wife; but if it be no objection to the child that he proceed from a marriage out of the jurisdiction of the state, no satisfactory reason has suggested itself to us, why this circumstance should operate against the widow, who, according to our law, is considered in the light of an heir, and takes by inheritance. *Partida*, 6, 13, 7.

The strongest reason that can be offered against her right is, that in contracting in another country, she intended to be governed by its laws in every thing relating to her marriage. Admitting this to be true, it cannot be considered as an abandonment on her part, or renunciation of the advantages which the positive laws of other countries might confer on her. A marriage in Scotland, entitles the wife to dower of her husband's real estate situated in England. 2 Henry Blackstone, 146; 2 Johnson's Cases, 29.

The judge of the court of probates, to whom this claim was first presented, directed that as the intestate left a child, the widow should only take the one-fourth of the estate in usufruct. On an appeal to the district court, the judge of that tribunal considered she was entitled to the one-fourth in full property. The reason assigned here for that decree is, that the child of the deceased proceeded from a former marriage, and that by the Roman law, the wife on such an event took not as an usufructory, but as owner, and that such was the law of Spain.

By the law of the *Partidas*, already cited, it is declared "that if the husband should not leave his wife the means of living independently, and she should not possess them herself, she may *inherit* one fourth of the whole, *notwithstanding he should leave children.*

By our Code, a wife under the same circumstances has a right "to take out of the succession of the deceased, what is called the *marital portion*—that is, the fourth part of said succession in full property *if there be no children.*" Civil Code, 334, art. 55.

This law clearly repeals that of the *Partidas*, by virtue of which the widow took whether there were children or not, and without distinguishing from what marriage they sprung. It would be strange then to hold that the right given her by the positive law of Spain to claim the one-fourth in full property was taken away by our Code; but that a provision of the Roman law to the same effect is still binding here, and that too, because it was in force in that country, whose direct legislation on the same subject has been repealed.

But that law could not have been in force there; for as we have already seen, the wife took one-fourth in full property whether the

husband left children or not. Consequently all inquiry as to the mother was done away, for whether they were her children, or her husband's by a former wife, the result was the same.

Independent of this reason, it is satisfactorily shown to us, that the provisions of the Roman law on the subject of marital portion were not of authority in Spain. Febrero states, that according to the jurisprudence of Rome, where the children were three or four, the widow only took a child's part; but that this rule was not observed in Spain, because the law of the Partidas made no distinction as to the number. *Febrero, p. 2, lib. 2, cap. 3, sect. 4.*

On the same principle we must decide this case. Our law makes no distinction between children of the different marriages, and we cannot. This rule of construction is almost daily acted on by this court. We could not adopt that contended for, without doing a great violence to the text. The Code says the widow shall have the fourth in full property, if there be no children. Were we to give the plaintiff the one-fourth, when the intestate has left a son, we would be doing one of two things; either disobeying the express words of the law, or saying that a descendant of a former marriage was not one of his children.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed; and it is further ordered, adjudged and decreed, that the judgment of the probate court be also annulled, inasmuch as it gives to the plaintiff a portion of the personal estate; and proceeding to give such judgment as in our opinion ought to have been given, it is ordered and decreed that the plaintiff do recover of the defendants possession of one-fourth part of the real estate of which Lyman Harding died owner in this state, to be held and enjoyed by the said plaintiff in usufruct, for and during the term of her natural life, subject however to the payment of one-fourth part of the debts due by the succession of said Harding, and further that the defendants pay the costs in the court of probates, and the plaintiff those of the appeals.

Baker, for the plaintiff.

Brownson, for the defendants.

Melançon's Heirs *v.* Duhamel. III, N. S. 7.

A judgment is valid, although the sum adjudged be not stated therein, when the sum appears on record.

FIRST District.

MARTIN, J.,* delivered the opinion of the court.

The plaintiffs having taken out execution to the district court, on the judgment rendered here, at September term 1821, 10 *Martin*, 225, the defendant obtained an injunction, which was, on argument, sustained, and the plaintiffs appealed.

The defendant's counsel urges that the judgment of this court was for costs only, at all events that no particular sum being mentioned in it, it is too vague and uncertain. He contends that there ought to have been in the judgment an express reference to the petition, in which a definite sum is claimed, or to the process verbal of the sale annexed thereto, by which the price of the land, sold to the defendant, is ascertained.

We reversed the judgment of the district court and gave judgment for the plaintiffs with costs. It is therefore clear that the judgment was not for costs only.

If the concluding sentence of the judgment be considered aloof from the record and the preceding parts, it is clear that the judgment being for no definite sum is too vague, and uncertain, but the judgments of the court include the reasons by which the judges arrive to the conclusion, which the constitution and laws require them to insert.

In the case now under consideration the judgment begins by an abstract of the pleadings. It is first said the plaintiffs sue for the price of a tract of land, purchased by the defendant; it is next stated that the latter resists the payment on a plea of the general issue, an allegation that a claimant of the land forbade the sale, and an objection is taken to a document being in another than the national language.

The judgment next proceeds to state that the plaintiffs established the sale, which the defendant denied, and it is expressly declared that the plea of the general issue is unsupported; that the defendant gave no evidence of the alleged claim, nor of the sale being forbidden; and the objection to the document being in the French language is

* PORTER, J., did not join in this opinion, having been of counsel in the cause.

overruled. The court next annuls the judgment appealed from, and judgment is entered for the plaintiffs with costs.

Now, it is clear that the judgment is for the consideration-money of the sale, the price of the land, for that is what the plaintiffs demand in the petition, and their right to which they support by the process verbal of the sale, annexed thereto. This sufficiently appears from an inspection of the record. *Id certum est, quod certum reddi potest.* Yet if the law requires that, where the judgment does not name enunciatively a determinate sum, it should contain an express reference to the record or *autos*, the judge *a quo* was correct in granting and sustaining the injunction.

Febrero, it is true, states, that this express reference is required; but a close view of the text of the law, which he comments, leads us to a different conclusion.

"We also say that if the judge does not declare, in his judgment, with certainty the sum for which he condemns; if he makes use of words from which it may be inferred, with certainty, that the defendant is absolved, or cast in the suit; if in such case, the sum in dispute be written in the record, then the judgment is valid." *Part.* 3, 22, 16.

The court in the judgment under consideration did not declare expressly the sum to be paid by the defendant: from the expression used, it is to be inferred with certainty that the defendant was cast, since the judgment is for the plaintiffs, and the sum claimed was written in the record, viz. in the petition of which the judgment contains an abstract: it then follows in the language of the statute, that the judgment is valid, and ought to be executed.

The action was literally that of debt of the common law, brought for a sum due on a matter of record, in which the judgment is *quod querens recuperet debitum suum.*

The defendant made no partial defence. He did not pretend that a less sum was due than the one claimed. He put the plaintiffs on strict proof of the allegations in the petition, made an allegation which he did not support by evidence, and an objection which the court overruled; the judgment declares the plaintiffs supported their allegations; judgment then followed as a matter of course, for what was claimed; the price bidden for the land, by the vendee and defendant, as appears from the record and written evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and the injunction dissolved, and that the defendant, and appellee pay costs in both courts.

Simon, for the plaintiffs.

Brownson, for the defendant.

Broussard *v.* Duhamel. III, N. S. 11.

When the witness has an interest in the question to be determined and none in the event of the suit, the objection goes to his credibility, not to his competency.

Purchasers under the same title, without partition, cannot prescribe against each other, by the lapse of ten years.

FIFTH District.

MATHEWS,* J., delivered the opinion of the court.

In this case the plaintiff sues for the recovery of a certain tract of land, in the possession of the defendant: who pleads in his answer the general issue and also inserted therein a prayer that his immediate vendors should be cited in warranty, &c. They, on coming in pleaded the general issue and title to the property supported by the prescriptions of ten and thirty years, and cited their vendors in warranty, &c., whose answer makes no change in the defence of the suit, neither does the answer of others cited in the same manner make any. In the course of the trial in the court below exceptions were taken to the admissibility of testimony offered in the cause. We have carefully examined all the bills of exceptions as contained in the record, and find no error in any of the opinions of the judge *a quo*, by which he admitted the evidence complained of: however he may have erred in the inferences drawn from said testimony. It appears to us that there is only one of those exceptions, on which a shadow of doubt can rest, that which relates to the indirect interest of the witnesses. But we are of opinion that their interest is only in the question, not in the event of the suit, and is applicable to their credibility, not to their competency. Having thus disposed of the bills of exception, it becomes necessary, for us to extract from the mass of testimony sent up in the record, such facts, as are required, fairly to investigate and justly to decide on the claims of the parties.

The evidence of the case shows that both plaintiff and defendant claim the property in dispute under the same original title; a concession or grant to Ledée. After his death, his succession was sold by competent authority. Amongst other things belonging thereto was a tract of land containing eighty arpens front on the eastern side of the bayou Teche, which was sold out to purchasers in parcels, of from ten to twelve arpens front; beginning the sale at the upper limit of said original tract, adjoining the land of Declouet, and continuing to sell down to the boundary of the land of one Le Beau, who held by

* PORTER, J., did not join in this opinion, having been of counsel in the cause.

grant from the then existing government of the province of Louisiana; but whether his concession was older or younger than that of Ledée, is not shown by the evidence. At this sale the plaintiff became the purchaser of several of these parcels, and has since acquired title from others who purchased, so as now to claim forty-two arpens in front; three of which (as it appears by the return of the surveyor, who was ordered by the district court to make the survey of the premises in dispute,) on the lower side, are now in possession of the defendant; who derives title from a purchaser at said public sale, who bought ten arpens immediately adjoining below the above mentioned forty-two. It does not appear that the land of Ledée's succession, thus sold, was ever regularly and entirely laid out and partitioned, amongst all the purchasers, in conformity with the proces-verbal of the sales. Some time after said sale, one or two of the buyers procured to be set apart for them so much of said original grant as they supposed to be their portions, by a surveyor named Gonsoulin; who fixed metes and boundaries, for which the warrantors of the defendant now contend; and on which they rest their title, and claim by prescription. These limits, it further appears from the evidence, were located and marked in the presence of several of the claimants by purchase at the sale of the succession of Ledée, and amongst whom the vendor to the plaintiff was present, when the land was laid off to him as above stated, and also the person who claimed the adjoining ten arpens below and that these two tracts or parcels of land had been held, possessed and occupied according to these limits, for upwards of ten years previous to the commencement of this action. On this possession accompanying the location of their claims, which placed within the limits of the tract claimed by the defendant, the land now in dispute, he claims title in virtue of the prescription of ten years. Whether the original or first purchasers of the land from Ledée's succession be considered as tenants in common, or co-proprietors of the whole part sold to them without real and fixed limits, or be viewed in the light of separate and distinct proprietors, each of the parcel which he purchased by a certain quantity of front on the bayou, easily to be ascertained by the mode of sale adopted by the officers who effected it, as they fixed the limit from which the first parcel was to commence; the result of the present dispute would in our opinion be the same. If they held in common, no one of the co-proprietors could acquire title to any particular part of the common property, except by regular partition between all those who were interested. If their claims were so separated, by imaginary limits, as to give a separate interest and title to each individual to a certain parcel, designated by beginnings and quantity in front, then neither of them could justly pretend title to any portion of the whole part beyond, or different from, the particular part sold to him by these unmarked limits expressed in the proces-verbal of the sale, unless by regular purchase from the person who had acquired title by the probate sale. It is not shown on the part of the defend-

ant that the persons, under whom he claims, ever acquired title by purchase, donation, or in any other way, from the person, to whom the land in dispute was stricken off at the public sale of Ledée's succession. The title on which they presume to bottom the ten years' prescription, is founded solely on the surveys and limits fixed by Gonsoulin. Surveying land and placing boundaries, by the request of parties who have evidently mistaken the proper location of their titles, ought not to destroy the rights of either party, or in any manner change their titles to the prejudice of either one, or the other. In other words, the simple act of surveying, fixing boundaries, and taking possession in furtherance of such proceedings, cannot create a title. Such possession might probably be a basis for the longest prescription.

But buying without title is no foundation for the long prescription. We are of opinion that the defendant and his vendors have possessed the disputed premises in error, and without a title, under which they can profit by the prescription of ten years, and they have not acquired by that of thirty years. The error which appears to have taken place in the location of the titles acquired by the purchaser at the sale of Ledée, and which seems to have remained unrectified in the hands of all subsequent holders, was occasioned by the conduct of the parties, and the surveyor, in commencing the actual division of the land at Le Beau's line below, instead of that of De Clouet above, the point established by the terms of the original sale. If the true principles of that sale had been pursued in locating the titles of the buyers, error and conflict of claims would have been avoided.

Upon a view of the evidence and law of the case, we are unable to discover any thing which can materially distinguish it from that of Babineau *v.* Cormier, adjudged at the last term of this court. Vol. 2, 666.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendant, three arpens in front by the ordinary depth of forty, being the land claimed by the former in this suit and that which is really in dispute between the parties, as appears by the evidence in the cause, and the survey and plat of the surveyor Johnston, made and executed by order of the court below, with costs in both courts. And it is further ordered, adjudged and decreed, that the case be remanded to the district court for the purpose of assessing damages against the warrantors.

Simon and *Baker*, for the plaintiff.

Brownson, for the defendant.

White *et al. v.* Brown *et al.* III, N. S. 17.

FIFTH District.

Decided, that the law of March 14th, 1823—providing that unless the sum of money specified in a note, bill, &c. to be due or payable, be expressed in *words at full length* when made or drawn in or out of this state, except that when made out of the state, it be shown to be made according to the laws and usages of such state, it shall not be obligatory, or admissible as evidence of a debt—was introductory of a principle entirely new to the law merchant; Nugent *v.* Roland, 12 *Martin*, 659; Debuys & Longer *v.* Mollere, 2 *Martin, N. S.* 625. It only governs notes, &c., made after its passage: the law must be read together with the article of the Civil Code, 4, 7, which declares that the *law disposes of the future, it has no retrospective effect.*

Martin *v.* Reeves *et al.* III, N. S. 22.

FIFTH District.

This was an action to rescind a sale, alleged to have been made in fraud of creditors.

Held, the acts of the vendor, after the sale, are against the vendee evidence of fraud in the vendor: so are his declarations as part of the *res gesta;* but neither is evidence of fraud in the vendee.

MARTIN, J., said:—

There cannot be fraud in the vendee unless there be fraud in the vendor; the defendants have, therefore, to establish the fraud of the latter. For this purpose they gave evidence of the conduct and declarations of the latter after the sale to the plaintiff; his continued possession and contract of the premises; his hiring and selling part of the property conveyed to the plaintiff in the same deed with the premises; his acting and holding himself out as the real owner of the premises. Fraud is seldom established by direct evidence. The proof of it, in most cases, results from numerous, grave, and con-

cordant presumptions; for this purpose, the conduct of one of the parties and his declarations are part *rerum gestarum*—all proper evidence to establish fraud in him. They are not, however, evidence of fraud in the vendee; and if there be no other evidence the fraud of the latter is totally destitute of proof. It is in this sense that what fell from the court in the case of Highlander *v.* Fluke *et. al.* 5 *Martin*, 442, is to be understood. On the same principle the existence of creditors to be defrauded may, and in many cases must, be established by the admission of the vendor, or by judgments obtained against him, which are *prima facie*, though not conclusive evidence against the vendee, who was not a party thereto. After, by such means, the fraud of the vendor is established, the party seeking relief has yet to establish that of the vendee—his participation in that of the former; for this purpose the evidence excepted to cannot avail.

Todd *et al.* *v.* Andrews. III, N. S. 25.

No appeal lies from an order to transfer a cause. What is grievance irreparable?

FIFTH District.

PORTER, J., delivered the opinion of the court.

This appeal has been taken from an order of the judge of the district court transferring this case to a neighboring district, in consequence of his standing in such relation to the plaintiff as forbids him sitting in the cause.

It has been more than once decided in this court, and that after much deliberation, that the transferring a cause from one district to another for trial, was not such an irreparable injury as authorised an appeal. The court has uniformly acted on the idea that mere delay was not a grievance which required the interference of this tribunal. 3 *Martin*, 171; 9 *Ibid.* 492; 10 *Ibid.* 443; 11 *Ibid.* 268.

The appellant, however, conceives that his case can be distinguished from those in point of fact, or, if not in fact, that at least there is an important consideration of law, which has escaped the attention of counsel and the court in the previous discussions of this subject.

He insists, that if his cause has been transferred, when by law it should not, the judge of the neighboring district can have no cogni-

sance of it; and hence he concludes that the injury is irreparable to him, and the court should at once correct it.

In point of fact, all the other cases decided in this court on this point presented the same feature as this; that is, it was contended they were *illegally* removed.

The point of law now raised was not discussed in them, because the first question to be decided in all these cases is, whether the decision be such as will authorise an appeal. Unless it is found of that description the merits of the decision cannot be gone into. The general rule on this subject is, that wherever the party can be relieved on a final judgment, the grievance is not such an irreparable one as requires the aid of this court at an earlier period. It is certain, that the error complained of here (if it be one) can be relieved after final judgment; and we are clear there is nothing to authorise us to interfere at the present stage of the proceedings.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

Todd, in *propria persona*.

Lesassier, for the defendant.

Parquin *v.* Finch *et al.* III, N. S. 27.

FIFTH District.

If a case be remanded, with the view of correcting a partial error, the district judge acts correctly, in assuming a former report of referees not excepted to, as the state of the accounts between the parties, and in ordering a partial reference only, with a view to comply with this decision of the Supreme Court.

Boissier's Syndics *v.* Belair *et al.* III, N. S. 29.

FIFTH District.

The decision of the judge *a quo* invariably prevails in the Supreme Court, on questions of fact when it is not manifestly erroneous.

Pintard *et al. v.* Deyris. III, N. S. 32.

The purchaser at a sale by order of the court of probates is not entitled to the action of redhibition.

FIFTH District.

PORTER, J., delivered the opinion of the court.

The defendant, sued for the price of a negro woman purchased by him at a probate sale of the succession of Henry Pintard, deceased, pleads, that the slave at the time of the sale was afflicted with redhibitory defects, which rendered her totally unfit for the purpose for which she was acquired.

The plaintiffs meet this defence by averring, that the action of redhibition does not take place in sales made by authority of justice, and insist that the sale made in the instance before us by order of the court of probates, is such a one as is contemplated by the article of our Civil Code in which this matter is treated of. Civil Code, 35, art. 74.

Of this opinion was the judge who tried the cause in the first instance, and such, also, is the conclusion we have come to.

The evidence shows, that the sale, at which the defendant purchased the slave, for the price of which he is now sued, was made in virtue *of a decree of the court of probates.* It comes therefore within the very letter of the law—it is a sale made *by authority of justice.*

This is sufficient, and we might conclude by saying, as we have often said, that where the law does not distinguish we could not. We think it proper, however, to notice the principal argument offered

against this construction, and state the reason why it has not prevailed with us.

It was contended that the article of the Code already cited, although so general in its expressions, clearly contemplated the case of forced sales, made to enforce the decrees of courts at the demand and suit of persons, other than the owners of the property; and that it was contrary to justice and equity, to apply the rule to cases where the sale was provoked by the owner, or his representatives, and made for his, or their benefit.

The justice and equity of introducing such a provision in any case may be a subject of doubt, as it exposes the purchaser to be greatly deceived in regard to the latent defects to which property, such as that sold here is subject: and its policy too may be questioned, as purchasers at public auction will not bid with such freedom, nor give so high a price, when they do not bid with security, and are not protected against fraud. But these were considerations for the lawmaker, not for this court. And were we to enter into them, we could not recognise the distinction for which the defendant contends. The absence of equity in such a defence, appears as great in the case of a forced sale, as that which was directed here. We are unable to see any good reason why a defendant in an ordinary action should have his debts paid by a diseased and defective slave sold as a sound one, and the buyer be without remedy; and yet, that at a sale made by order of the court of probates, to pay the debts of a succession, and settle the estate, the purchasers at public auction should have the right to be relieved. The equity of both appears to us equal. At all events no such difference has been shown, as to authorise us to make the distinction contended.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Baker, for the plaintiffs.

Brent and *Fennessy*, for the defendant.

Reynolds *v.* Buford. III, N. S. 35.

FIFTH District.

The endorser's residence being only at six miles distance: *Held*, that three or four days are too great a delay in giving him notice. Hill *v.* Martin, 12 *Martin*, 177.

Broussard *v.* Bernard *et al.* III, N. S. 37.

A husband can only sue the heirs of his wife, in the district court, in order to establish contradictorily with them the amount of the debts of the community.

FIFTH District.

MARTIN, J., delivered the opinion of the court.

An action was commenced against the present plaintiff in the district court in 1819 by the defendants, heirs of his wife, to set aside a sale made by him, on the ground of its being made in fraud of their rights. The parties agreed, and it was adjudged that the sale be set aside, and that he should keep the property at its estimated value, and to pay the residue to the heirs, after the debts of the community were discharged.

The present suit is brought to establish, contradictorily with the heirs, the amount of the debts. They pleaded that the estimation was made in fraud, &c. During the trial the district judge conceived that he had no jurisdiction of the first suit, so far as its object was the liquidation of the succession; he therefore reversed all the former part of his judgment relating thereto, and left in force that, which annulled the sale. The plaintiff appealed.

This court has decided in the case of Turner *v.* Collins, 1 *Martin, N. S.*, 371, that the surviving partner may demand from the heirs of the deceased a division of the partnership property in the district court. A suit for such a partition presupposes a liquidation; nay, the payment of the debts. Its object is to compel the holder of the property to surrender it; the creditors of the succession are not interested in it.

It is, therefore, ordered, adjudged and decreed, that the last judgment of the district court be annulled, avoided and reversed, and that the case be remanded for further proceedings, and that the defendants and appellees pay costs in this court.

Brownson, for the plaintiff.

Simon, for the defendants.

WESTERN DISTRICT, SEPT. TERM, 1824.

Phillips *v.* Paxton *et al.* III, N. S. 39.

The name of one of the partners may be the *nom social* of the firm, and the other partners are bound by contracts entered into by him, whose name is used, in his individual name in such case.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This action was commenced on a promissory note, executed by Paxton. Gorton's liability is averred on the ground of his being a partner of Paxton at the time the obligation was executed. Paxton suffered judgment to be given against him by default. Gorton contested his liability, and judgment being given against him he appealed.

Articles of partnership were produced by the defendants on the trial below, by which it appears, that in the month of October, 1821, the defendants entered into an agreement to carry on the business of making saddles and harness, one of the partners (Gorton) furnishing a certain sum of money, the other contributing his industry, and also putting in some capital.

Under this agreement, it is clear, the appellant cannot be made responsible for the whole amount of the obligation sued on. The partnership, though called by them in the articles a "commercial and special partnership," was clearly that kind of association known to our law as a "particular partnership," in which the partner is only

bound for his *virile* share, and not even for that, unless the partner who contracts in his own name were authorised to bind his associate in this manner, or it be proved the debt turned to the benefit of the partnership. Civil Code, 390, 13; 398, 43 and 44.

The plaintiff, however, rests his right to make the defendant responsible, on ground foreign from these articles of agreement. He says they never were recorded, and that the person under whom he holds, and with whom the debt now sued on, was contracted, had no notice of them; that although the defendants, when they first associated together, may not have contemplated a general and commercial partnership, yet they subsequently altered their views: that this note was given for the purchase of merchandise: that the appellant's consent to this purchase is proved, his participation in the management of the affairs, establishing the right on his part to participate in the profits, shown: and lastly, that at the dissolution, a considerable part of the property and debts belonging to the firm passed into his hands.

All these facts have been proved by the evidence introduced on the trial: and the question is, whether they make the defendant liable as partner, on the note signed by Paxton. He insists they do not, and although his defence has taken a most extensive range, the only part of it, which appears to us worthy of a serious examination, is that founded on the manner in which the debt was contracted. The defendant relies on several articles of our Code, and particularly those which declare that "the debts of the partnership are those contracted by the person who had the power to bind all the partners in the name of the partnership. "That the debt is presumed contracted in the name of the partnership when the partner adds to his signature that he signs for the partnership, and not otherwise." To enforce still further these principles, he relies on *Pothier, Traite de Société, nos.* 98, 99, 100 and 101, and the *Curia Phillipica, Companeros, nos.* 2 and 3.

It is clear from the evidence, that the appellant was to participate in the profits expected to be derived from the sale of these goods and others, which Paxton had previously purchased; and that this fact, and that of his being in partnership, were known in the community where the parties lived. The contract must therefore be presumed to have been made in relation to both; for, where one of the partners endeavors to escape from the responsibility created by a contract by which the whole firm profited, the *onus* of showing that he was excluded, most certainly devolves on him.

Taking it then as a fact, that the vendor of the goods for which this note was given, sold them with a knowledge of the appellant being a partner, and with an eye to his responsibility, does the selling them to one of the partners, by his name, prevent recourse against the other? We have already cited those passages of the law on which the defendant relies. There is nothing in them which says, that a contract for the benefit of a partnership, and binding on them, may not be made by one partner in his own name; though it is true, the legis-

lature by indicating the manner in which debts may be contracted, have authorised the argument, that in pointing out one mode, they intended to exclude all others. This rule of construction is not without its weight; but being one by which intention is presumed and not expressed, it is necessarily subject to be modified by all the other considerations and reasons from which a different meaning could be inferred. We deem it, however, unnecessary to examine the question how far a contract clearly entered into in relation to one partner alone, would bind dormant partners who participated in its gain; because we believe that this contract was made with the partnership through the name of one of the partners and in giving it effect according to the intention of the parties, we do not violate those provisions of the law on which the appellant rests his defence.

The defendants, it is placed beyond doubt, entered into a commercial partnership, and traded in the purchase and the sale of merchandise. The whole business, we find, was transacted in the name of Paxton, and no other used. Now, if a different name than that of one of the partners be of the essence of the partnership, it will follow that there never was any between them. But this conclusion would not be admitted, we presume, even by the appellant himself. We are certain it would be in direct opposition to law; for the contract of partnership is that, by which two or more persons agree to put something in common with a view to divide the benefits they expect to make from the same; and only four requisites are necessary to its existence; namely, that each should bring something in either money, property, or industry—that the contract should be for the common benefit—that the parties intend to divide the profits in the proportion to the amount put in—and lastly, that condition which is common to all contracts, that its object should be lawful. Civil Code, 388, 181.

If all these things belong to the agreement, the name then given to their association is of little importance; they may call it what they please; they may give it the denomination of such a one, & Co., of two or more of the partners; of one, or of all; or they may leave it without any. If they resort to the latter mode, as was done in the instance before us, their contracts are not on that account less binding. Any name, used by the consent of all, binds all. It is not the first time this argument has been used in this court, though it has never been before pressed with so much earnestness; and it then received from us this answer, that the *nom social* was that which the partners chose to bestow, and that an appellation embracing all the members of the firm was unnecessary. Ward *v.* Brandt's Syndics, 11 *Martin*, 424.

In this instance, it is in evidence that the partner who is appellant, permitted the other to buy and sell, and carry on the partnership affairs in his own name. We consider this as a clear assent on his part, that the name of this partner should be that of the firm, for all the business done in relation to it. And that it is now too late for him, after hanging out these colors to mankind, to endeavor to escape

from the responsibility which in law and in equity and justice he has incurred. *Qui sentit commodum, debet sentire et onus.*

We have not noticed the objection taken to Ogden's testimony because, under our understanding of the law, enough is shown by other evidence, to fix responsibility on the appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas, Boyce and *Scott*, for the plaintiff.

Bullard and *Baldwin*, for the defendants.

Mulhollan *v.* Voorhies. III, N. S. 46.

No action can be maintained on a corrupt bargain: *procul estote profani!*

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff charges, he purchased a tract of land at a sheriff's sale, for 1106 dollars, and gave his bond therefor at twelve months, in which the defendant joined him as his surety—it being understood they would be equally interested in the bargain, and afterwards agreed to take in Cleveland, as a copartner—that the land was afterwards sold for 3600 dollars, and the defendant received the proceeds of the sale, and undertook to take up the bond and pay to each of his associates their shares of the profits; that he has not paid the bond which has been put in suit against the plaintiff, whose property has been sold to pay a part of the judgment, &c.

The general issue was pleaded—there was a verdict, and judgment for 600 dollars against the defendant, and he appealed.

The statement of facts shows that Cleveland, the plaintiff's witness, deposed that "Mulhollan purchased the land for 1106 dollars—judge Voorhies was his surety—the deponent was sheriff. It was understood they were to purchase the land together. *Mulhollan told the deponent to knock it off to him, and the deponent should have one-third of the benefit.* The plaintiff told the deponent he sold the land for 3600 dollars in Wood's notes. The defendant got an order for the notes and accounted to the deponent for his share of the net profits, after deducting the twelve months bond. The profits were 833 dollars 33 cents, which fell to the share of the deponent."

The bargain, which this witness discloses, is so corrupt a one that it cannot be the ground of an action; *ex turpi pacto non oritur actio.* The plaintiff agreed with the parish judge, to avail themselves of the distress of one of their fellow citizens, whose property the sheriff was selling, lest by crying too long the property, others might have the opportunity to bid and the bargain should be rendered less profitable; the sheriff was taken as a partner, and the plaintiff told him if he would knock off the land to him, he would have one-third part of the benefit. This had its effect. The land was knocked off at one-third part of the price, which the confederates soon obtained, and the parish judge paid to the sheriff 833 dollars, 33 cents, nearly four-fifths of the price, at which he had knocked off the land.

Now, the other confederate sues the judge for his 833 dollars, 33 cents, and a part of the capital employed in the unrighteous trade. They, who come into court with such unclean hands, ought to be told *procul estote profani*, the temple of the justice of your country is the house of God, it should not be made a den of thieves.

The judge erred in sustaining the suit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the suit be dismissed at the plaintiff's costs in both courts.

Thomas, for the plaintiff.

Boyce, for the defendant.

Martin *v.* Heirs of Martin *et al.* III, N. S. 48.

SIXTH District.

Decided, that sureties on curator's bonds may be sued in the district court, and if they plead discussion, the creditor may go into the court of probates to do it. Beneficiary heirs may also be sued in the district court, when a breach of duty is alleged which renders them personally responsible.

On another point, Porter, J., said:—The third possessors who are appellees have prayed they should have final judgment in their favor; but this prayer cannot be acceded to, unless we examine the case on its merits, and this we do not conceive we are authorised to do. When the inferior court declines to pass on the merits, by the opinion which it entertains in regard to its jurisdiction, this tribunal

cannot decide on them; for it can only exercise appellate jurisdiction, and a judgment here on the merits, where none had been given below, would be an original one. All that this court can do, is to examine whether the court below erred in refusing to decide on the rights of the parties, not what these rights are. It was said that this tribunal has often decided causes, on points different from that which the court below acted on; and we were referred to a case which went off on the trial in the first instance on a question of prescription, and was adjudicated on in this court on other grounds. These positions do not in the least affect the principle which must govern the case. In those referred to, there was an examination of the merits; and they once gone into, no matter on what point decided, the whole case was brought before the court. There is an essential difference between pleas such as prescription, *res judicata*, and others of the same class, which delay the progress of the cause, and pleas which decline the jurisdiction. The latter, if sustained, withdraw the whole case from the court; the former, if supported, admit jurisdiction, and are one of the means of defence on the matters really at issue. We are quite satisfied that we cannot examine the question submitted by the appellees. If we did, it would be the first judgment pronounced in relation to them, and that is the very definition of original jurisdiction.

Rost v. The Church of St. Francis. III, N. S. 54.

SIXTH District.

Where the members of the church against which the present suit is commenced, were created a body politic, by an act of the legislature of February 10th, 1813, limiting its duration to ten years, but was revived by an act passed on the 17th of March, 1823; it cannot be doubted, that no corporation existed from the 10th of February, to the 17th of March, 1823. The act of revival had no retro-active effect. Hence the negligence of officers of the church, in that interval, whereby plaintiff's house was burnt, cannot be charged to the corporation.

Buford *v.* Valentine. III, N. S. 57.

SIXTH District.

Interrogatories propounded to a party in a suit cannot be answered by his agent.

Hervey *et al.* *v.* Russell. III, N. S. 59.

SIXTH District.

When plaintiff fails to make out his case, there will be judgment of nonsuit.

Baldwin *v.* Hazleton. III, N. S. 61.

An action for money received by defendant as sheriff, on an execution in favor of plaintiff. Sheriff pleaded general issue, compensation and judgment for the balance.

SIXTH District.

MARTIN, J., said:—Our attention is first drawn to a bill of exception to the district court, refusing to admit as evidence the execution produced by plaintiff's counsel.

Its introduction was opposed because it appeared to bear date of *September*, 1822, and to be issued against John Sibley and John H. Sibley, the property of John Sibley being first discussed, while the

execution described in the petition is stated to bear date *about September*, 1822, and to be against John Sibley.

As the execution was not the gist of action, which was the actual receipt of the money, we think the variance was not fatal, and the execution was set forth with sufficient certainty: the epithet *about*, prefixed to the month in which it is stated to be dated, authorised the production of an execution dated within three months, and the execution was in a suit in which John Sibley was the principal debtor. J. H. Sibley's property was directed to be spared if John Sibley's could be had. On pleading compensation and praying judgment for a balance due the defendant, the plea of the general issue was waived.

We find no evidence of the claim offered in compensation.

Congregation of St. Francis *v.* Lauve. III, N. S. 62.

SIXTH District.

Nonsuit, for failing to make out case.

Rutherford's Representatives *v.* Martin's Heirs. III, N. S. 63.

SIXTH District.

Purchasers of land at probate sale, cannot call on the succession for the value of improvements put on it by third persons, if it were sold such as it belonged to the succession.

Voorhies, for the use of Cappel, *v.* Mulhollan. III, N. S. 70.

SIXTH District.

The plea of *res judicata* sustained, it appearing that the same party claimed the same thing in another suit, when it was disallowed.

Baillio *et al.* *v.* Wilson. III, N. S. 73.

Wilson *v.* Baillio *et al.* III, N. S. 74.

SIXTH District.

Creditors of an estate accepted with the benefit of inventory, must go into the court of probates, and be there paid according to the rank and order of their privilege. The circumstance of the creditor having a mortgage does not take him out of the general rule. Civil Code, 178, art. 138; De Ende *v.* Moore, 2 *Martin, N. S.* 336.

Ferguson *et al. v.* Thomas *et al.* III, N. S. 75.

Inconsistent pleas cannot be received.

Private writing not made double, is good as a commencement of proof.

A promise to deliver cotton in payment of a debt, which the obligee *is to sell*, is not discharged by the death of the latter.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This action was commenced on an obligation by which the defendants promised to deliver a certain quantity of cotton to the plaintiffs.

The defendants pleaded as follows:

They denied all and singular the allegations contained in the plaintiffs' petition.

The right of the plaintiffs to sue, because the obligation was personal to George Rich, a deceased partner in the house of Ferguson & Rich, who is represented in this suit by his mother and heirs.

The right of one of the plaintiffs Rebecca Rich, because she was not the heir of George Rich.

And lastly, that the plaintiffs could recover, because the contract was a synallagmatic one, and two copies of it were not made according to law.

No evidence appears in the record to establish the execution of the instrument sued on, but the plaintiffs insist the want of this proof is supplied by the pleadings.

This court has held in several cases, that where a defendant pleaded inconsistent pleas, such as joining that of payment and satisfaction to the general issue, or in addition to a plea that he did not sign the note; an allegation that he was not of age when it was executed, and that the instrument was entered into without any valid consideration, we should consider the general denial as waived, because the fact disclosed by the party himself forbids any other construction.

When a man says he has paid his note, it is an acknowledgment that it once had an existence. When he affirms that it was entered into without a good and valid consideration, he admits that it was executed. See 8 *Martin*, 492; 11 *Ibid.* 640; 1. *N. S.* 127, 412.

This case, it appears to us, comes within the principle under which these cases were decided. The defendant joined to his answer, that he did not sign the note, an averment, that "the obligation sued on is a synallagmatic agreement, containing stipulations and agreements on the part of all the parties who have a distinct interest, and was

not executed in as many originals as there are parties." This is surely an admission that it was executed. If it had never been made by him, as the general issue implies, it could not be defective, because it was not made double.

This opinion brings us to the merits of the dispute. The obligation sued on was, as we have stated, for the delivery of a certain quantity of cotton. It recites as a consideration for the promise, that indulgence should be given in the proceedings on two twelve months bonds, one in favor of Walter Turnbull, and the other in favor of the then firm of Ferguson & Rich. The defendants bound themselves *in solido*, to furnish on or before the first day of January next ensuing the date of the agreement, a sufficient quantity of cotton in bales to pay the amount of the bonds with costs: the said Rich to ship the cotton, and apply the net proceeds to the extinguishment of the said bonds. This agreement is signed by the obligors alone, and to the plaintiffs' prayer of recovery they now object,

That the contract was not executed in as many originals as there are parties.

That the contract was a personal one, and that Rich, the party who was to sell the cotton having died, they were not obliged to confide this trust to his heirs and representatives.

On this last point the court below gave judgment against the plaintiffs, and they appealed.

The article of our Code which requires that there should be as many originals as there are parties having a distinct interest, was made to insure to each the means of enforcing the agreement, and applies to these cases where the contract is perfectly synallagmatic, or bilateral; that is, where the obligation which each of the contracting parties enters into, is equally the principal obligation of the contract, as in the contract of exchange, partnership, &c. and does not govern a case such as this, where, though there are two parties, as there necessarily must be to every contract, the obligation of one was only incidental, and a consequence of a performance of the other.

The promise here was merely to make a *dation en paiement*, and there was nothing stipulated on the part of him who was to receive it, in which the other party could have had an interest antecedent to his own performance. We therefore think it was unnecessary he should have had an original. Pothier's Obligations, no. 9. Were we even to agree with the appellees, that this was one of those cases where there should be as many originals as parties, they would still be unable to escape from their obligation. The law does not say the act shall be null and void, for want of this formality, it declares they shall not be valid, (*ne sont valables*,) that is, that the agreement is not perfect, that it does not make full proof of what is therein contained. But although it may not be sufficient for that purpose, it is still a writing emanating from the party against whom it is produced and is a commencement of proof in writing. This is the construction

put on the article of the Napoleon Code, from which ours is taken; and of its soundness we do not think there can be a doubt.

The second point, and that on which the inferior court decided the case, appears to us free from any difficulty. The defendants agree to pay certain debts in cotton, and the person who was to receive it, promised to sell it, and place the proceeds to their credit. They now say they are discharged from their obligation, because the payee has deceased, and that they have not confidence in any of his heirs and representatives. This may be very true, but why they should be discharged from their engagement, and the heirs lose their debt, because the appellees have not confidence in them, is what we are unable to understand. The general rule is, that all the obligations of the ancestor pass to his heirs, active as well as passive. The exceptions to this rule are these obligations, which result from agreements, in which the personal qualities of the person promising are to be supposed the leading motive of the contract, and where the want of them cannot be supplied by any other, or compensated by pecuniary damages. Such is the confidence we repose in our physician, who assists us in sickness, the painter whom we may desire to make family portraits; and in case of their decease, their heirs cannot demand that they shall be permitted to supply their place or perform their contract. But, an engagement to ship cotton may be performed by any one; the qualities of mind are not the leading consideration that induced the contract. Pecuniary responsibility is the moving cause, because the non-performance can be compensated in damages, and no objection can be made to the heirs, on that score, where they are the creditors of the person whose engagement they seek to enforce.

On examining the record, for the purpose of giving final judgment, we find there is not sufficient evidence to enable us to do so. The obligation on which the defendants are sued, states they have bound themselves to pay two twelve months bonds, and these bonds are not produced, nor is there any other evidence by which the amount of either can be ascertained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the case be remanded for a new trial, and that the appellees pay the costs of this appeal.

Johnson and *Wilson*, for the plaintiffs.

Thomas, for the defendants.

Collins *v.* Welsh. III, N. S. 82.

SIXTH District.

An injunction bond, executed before an order of court has been made, declared as binding as if executed after.

Smoot & Dinsmore *v.* Baldwin. III, N. S. 84.

SIXTH District.

Decided, that a sale of slaves, not followed by delivery, will not prevail against a second purchaser in good faith to whom they are delivered. The delivery may be legal and fictitious, when the intention of the parties is manifested by expressions to that effect in the act of sale, &c. But the deed exhibited by appellants contains no expression of delivery.

Calvit *v.* Compton *et al.* III, N. S. 86.

SIXTH District.

Where vendor was called in warranty, and said he transferred and delivered two slaves to plaintiff, but he concludes that he has a *just and legal title* in them; *Held*, that the transfer and delivery must be considered as one which did not vest title.

English *v.* Latham. III, N. S. 88.

SIXTH District.

The penalty cannot exceed double the amount of the injury. *La pena puesta en gran cantidad no se extiende a mas de dos tantos. Fuero, I,* 11, 5. An attorney on record cannot become a competent witness by striking his name off the docket, and renouncing his fee. 1 *Martin's Digest,* 537.

Shiff *et al. v.* Wilson. III, N. S. 91.

The husband may be surety for the wife in an appeal bond. Courts in this state cannot enlarge their jurisdiction by fictions.

SIXTH District.

PORTER, J.—The petitioners state that the defendant was wife of the late James H. Gordon, who was their debtor; that at his decease, she took possession of all his estate, real and personal, retains it in her possession, and uses it as her own: that she took an active concern in the affairs of the community: that she did not make a faithful inventory of the property: and that she has concealed and made away with part of the effects thereof: by reason of all which, she has made herself personally responsible for the debts contracted by her husband.

They also pray that judgment may be given against her as tutrix to the minor children and heirs of the said Gordon, and that the same be satisfied out of his estate, in her hands to be administered.

To this she pleaded several pleas, one denying all the facts on which her personal liability is charged; and the other declining the jurisdiction of the court, and averring that the case was one properly cognisable by the court of probates: the others do not require to be mentioned.

The cause was submitted to a jury on special facts, whose finding

in the opinion of the court below, having negatived these averments in the petition, which charge the defendant as liable, in her private capacity; but having also found that the debt was due by the estate of James H. Gordon, it gave judgment that the plaintiffs recover from the defendant the sum claimed in the petition, to be levied from the goods and chattels of said estate, in the hands of the defendant, tutrix to her minor children, to be administered.

From this judgment the defendant appealed, and the plaintiffs on the appeal have come into this court, and prayed that the judgment might be so amended, as to declare and make her responsible in her private capacity, for the amount ascertained to be due them.

Previous, however, to filing this prayer for amending the petition, the plaintiffs moved to dismiss the appeal, on the ground that the husband of the defendant had signed the appeal bond as surety, and that he could not legally do so, as he was also defendant in the cause.

The husband who appears in an action where his wife is sued for debts antecedent to the coverture, is only nominally defendant, and his presence is required, not because the judgment can affect him, but because it is necessary he should watch over and protect the interests of his wife, who, during marriage, is considered, in regard to judicial proceedings, as a minor, and incapable of defending herself. The judgment rendered in this case is against her alone; and if he have the other qualifications, which the law requires in judicial sureties, we are entirely satisfied that the circumstance of his being made defendant for the purpose of protecting the interests of another, does not prevent him from acting as surety. By giving bond in his capacity he furnishes that security, *in addition to the responsibility of the defendant*, which the law contemplated in requiring another person than the party cast in the suit to sign the appeal bond.

This brings us to the question of jurisdiction. The defendant complains, that the judgment rendered here, is one which could not be legally given against her, by the district court; that the court of probates has exclusive jurisdiction of the settlement of estates administered by the representatives of minor heirs; and that the decree having negatived all idea of personal responsibility, the court could not give judgment against her in her representative capacity. This position, so far as it assumes exclusive jurisdiction to the probate court, of claims against successions represented by others, than heirs arrived at the age of majority and accepting purely and simply, is too clearly supported by law, and too solemnly recognised by repeated judgments of this court to be now questioned. The plaintiffs, therefore, with great propriety, have not contested the general rule, but they contend that the court, having obtained jurisdiction, by those allegations in the pleadings which charged the defendant with acts that made her responsible in her personal capacity, could with propriety, and without exceeding the powers vested in it, give judgment against her in her character of administratrix. But to this argument we are as little prepared to give assent, as we would be to that which would

have asserted this right in the court, on pleadings conformable to the truth of the case. Allegations of the parties confer the power on these tribunals in which they are made, to examine the case which they set out, if that case be one proper for the court to take cognisance of; but they do not invest it with authority to investigate causes which the law has not assigned to it. If such were the consequence, then it would follow that the tribunals of justice in this country would be unlimited in their jurisdiction, and the parties litigating could contract their powers, or enlarge them, as it suited their interest, caprice, or necessities. To what difficulties this would lead, it is almost unnecessary to state; by the operation of this principle, the whole jurisdiction of the court of probates would be taken from it; the settlement of estates, instead of being made upon an examination of the claims of all interested, and with a due regard to the legal rights of the respective creditors, would be thrown into utter confusion, and litigation multiplied, and costs augmented without any rational object being attained. Nor would the evil be confined to that court, it would extend to all in the state. By the same process of reasoning, the criminal court of Orleans could entertain a question in regard to a land title, or a justice of the peace give judgment for 10,000 dollars. All that would be necessary for their exercise of this authority, would be an allegation of crime before the former, and the statement of a debt within the jurisdiction of the latter. We know of courts in other countries, in England particularly, taking on them, by adding to a charge of those things of which they have cognisance; other matters not originally within their jurisdiction, the right to investigate the latter and decide on them. But in this country, where the tribunals of justice derive their authority from positive law, and have just so much power as is conferred on them, and no more: where each order of magistracy, judicial, executive and legislative, are bounded by the constitution, and can only move within the orbits assigned them, the idea that any branch of our government may enlarge its limits, or increase its power, by its own act, cannot be for a moment tolerated. If we could extend our jurisdiction by fictions, we might also create them in each particular case, and pass not on facts which were proved, but on those we imagined.

We are, therefore, clearly of opinion, that the allegations in the petition, which gave jurisdiction to the district court of a case within its authority, did not justify it in giving judgment on matters belonging exclusively to another tribunal, and that the judgment rendered in this case was null and void, and must be reversed.

It remains, however, to consider whether that court did not err in not rendering judgment against the defendant in her personal character. An examination of the facts, on which this judgment is demanded, need not now be gone into, because the opinion we entertain on a bill of exceptions, taken to the opinion of the district judge, permitting certain facts to be submitted by the defendant to the jury, requires us to remand the cause. As to that part of it, which relates to the

relevancy of the fact, as not growing out of the pleadings, we think there is not any foundation for it. The ground of the action is, that the defendant made herself personally liable by various acts in relation to the estate of her deceased husband: the answer meets all these facts, in detail, and denies them. The questions submitted to the jury, fairly arose on the issues joined, and were necessary to a correct understanding of the conduct of the defendant. As we said in the case of Livingston *v.* Heerman, parties may present to the jury, facts which go to establish the title set up, although these facts should not be set forth in the petition: it is true, that they must not be at variance with the allegations in the petition and answer, but the facts are always pertinent where they tend to support the claim set up. 9 *Martin*, 710.

As to that part of the exception taken, which objected to the questions submitted to the jury, because the intention or design with which the defendant had done certain acts, more difficulty exists. We are not prepared to say that there may not be some acts done by a widow, in relation to an estate, so equivocal in themselves, that the intention or design with which they are committed, may not be a proper subject for inquiry and decision by a jury on special facts submitted. But whether she has done any act in regard to the community, with an intention to accept it, appears to us too general. There are many acts by which a widow may lose her right of renouncing the acquets and gains, and make herself responsible for the debts, no matter what may be her intention and design. In regard to these acts, if the submission of intention was made to control their legal effect, it was erroneous; if not with that design, it was useless. The cause must, therefore, be remanded on this ground; and there is also another consideration which would induce us to send it back, if that already mentioned were wanting. There is a most violent presumption created by the verdict, that the property retained by the widow, and not sold, makes a part of her *biens propres;* though it is not proved so clearly as to enable us to act on it as a fact legally established. The case indeed does not differ from that of Cox against the present defendant, decided at the last term of the court. 1 *Martin, N. S.* 629.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; that the case be remanded for a new trial, with direction to the district judge not to permit the defendant to submit to the jury the intention or design with which any act was done in relation to the estate of the late James H. Gordon: it is further ordered, adjudged and decreed, that the appellee pay the costs of the appeals.

Baldwin, for the plaintiffs.

Wilson, for the defendant.

Roberts *v.* Rodes. III, N. S. 100.

SIXTH District.

Held, motions for new trials are always addressed to the legal discretion of the court.

The only difficulty in the present case was this:

PORTER, J., said:—We have already seen that this action is instituted on a contract of exchange, by which a house and lot were given for three slaves. The judgment of the district court is, that the plaintiff recover of the defendant, the sum of six hundred and fifty dollars in money. This is not rescinding a contract of exchange, but a contract of sale; or in other words, a different contract from that which the parties entered into. Redhibition, according to our Code, is the cancelling of the sale on account of some defect in the thing sold, such as may be sufficient to oblige the seller to take it back again, and have the sale annulled. Civil Code, 356, art. 65. Were there no other provision in our law but this, it would necessarily follow that in annulling the contract, the parties should be replaced in their original position; the plaintiff giving back what he originally received, and getting in return what he had given for it. A reference to other works of authority places the subject beyond any doubt.

"*Redhibitorio es bolver la cosa compradu, el comprador al vendedor, y el bolverse el precio que dio por ella Curia Philip. lib. cap.* 13, *nos. Verbo Redhibitoria.*" The price given here was not money, but a house and lot; or, strictly speaking, there was no price, for the contract was not one of sale.

Pothier treats of this subject with his usual accuracy, and gives the most satisfactory information on the point now under discussion: "L'acheteur (he says,) est en droit de demander par l'action redhibitoire la résolution et nullité du marché *et qu'en consequence les choses soient remises en meme etat que s'il n'etoit pas intervenu.*" *Pothier, Traité du Contrat de Vente, no* 217. In support of this doctrine, he cites the Digest, *liv.* 22, *tit.* 1, *l.* 23 and 60.

There is some difficulty in applying these principles to the case, as only one of the slaves is afflicted with redhibitory defects, and the property given in exchange was a house and lot, which most probably is not susceptible of such division as would enable a portion precisely equal to the value of the property now sued for to be returned. By law, the vendee, who acquires several slaves by one contract, is not permitted to annul the whole contract for a defect in a part of the objects purchased. 6 *Martin*, 689. This rule, however, of necessity,

yields to cases where, from the nature of the agreement, a partial rescission cannot take place, and there is the same necessity that the vendee should exercise it for the whole. For there is no other way that the parties can be replaced in their original position, or that the thing given as a consideration can be restored

The pleadings and evidence do not enable us to give final judgment according to the view we entertain of the legal rights of the parties. We think the cause should be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the cause be remanded for a new trial, and that the appellee pay the costs of appeal.

Bullard and *Holkam*, for the plaintiff.

Rost, for the defendant.

Martin *v.* Curtis *et al.* III, N. S. 105.

The acknowledgments of the vendor in the deed of sale, are evidence against a subsequent vendee.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff claims certain slaves in the possession of the defendants. They pleaded the general issue, prescription and title under Benson, whom they called in warranty.

Benson alleged that the plaintiff never had possession of the slaves under the sale from Wallace, by virtue of which he claims them—that he released all his right to Wallace, who sold the slaves to him, and that he and his vendee, the defendants, have possessed them upwards of five years—that Wallace's sale to the plaintiff was a simulated one.

The plaintiff had a verdict and judgment, and the defendants appealed.

The documents produced are

1. Wallace's sale of the slave sued for, to the plaintiff, March 21, 1817.
2. Benson's to the defendants, November 30, 1818.
3. Wallace's sale to Benson, July 3, 1818.

The sale of Wallace to the plaintiff, is a *vente à remere*, a sale with a clause reserving to the vendee the power of redeeming.

That of Wallace to Benson recites that of Wallace to the plaintiff, and Benson promises to procure the plaintiff's release and reconveyance.

Our attention is first directed to a bill of exceptions taken by the defendants' counsel to the refusal of the district judge to charge the jury, that "in law, the acknowledgment in the conveyance from Wallace to the plaintiff, that the price of the negroes was paid down, was no proof against Benson that such a payment was made."

We think the district judge was correct. Benson was Wallace's vendee, and must be bound by the acts of his vendor, in regard to the thing sold.

The first plea of the defendant, the general issue, is unsupported. The plaintiff proves his right by the production of the deed of sale of Wallace, under which the defendants claim. This deed is a notarial one, and the identity of the slaves is admitted in the statement of facts.

The plea of prescription, *i. e.*, that the defendants possessed five years, is unsupported; their title bears date Nov. 30, 1818, and the citation in the present suit appears to have been served on the 6th of November, 1823.

The deed of Benson is posterior to that of the plaintiff, and recites the conveyance of his vendor (of the negroes sold,) to the plaintiff, and he accepts the sale on the covenant of his vendor to produce a conveyance or release from the plaintiff. This does not appear to have ever been obtained.

Benson pleads, 1. That the plaintiff never had possession of the slaves sold. The plaintiff's deed expressly sets forth that the slaves were delivered to him. The statute provides that the tradition or delivery of slaves takes place by the mere consent of the parties, when the sale mentions that the things were delivered to the buyer. Civil Code, 350, art. 28. It therefore follows, that the plaintiff had that tradition or delivery, which transferred the vendor's right.

Benson, who, when he purchased the slaves from Wallace, was informed by a clause in his deed, that the negroes he was purchasing were already sold to the plaintiff, and was willing to trust Wallace on his covenant that he would procure the plaintiff's reconveyance or release, cannot complain that the plaintiff, by permitting Wallace to possess and have the slaves as his own, enabled him to defraud and impose upon him the second vendee: for the declaration of Wallace, contained in the sale to Benson, that the title to the slaves was in the plaintiff, precludes the idea of his exercising any fraud or imposition.

The statement of facts shows that the plaintiff permitted Wallace to keep the negroes after the sale. The evidence of fraud which this complaisance presents, if it could be invoked by Benson, who bought with his eyes open, and to whom every thing was disclosed, must

vanish, when the perusal of Wallace's deed to the plaintiff shows that, although the former was secured by an *actual bona fide sale*, yet the intention of vendor and vendee was that the slaves should be reconveyed, as soon as the former availed himself of the right of redemption, reserved to him by a clause in the deed.

Admitting that to a purchaser without notice, the circumstance, that after the sale was completed, by a legal tradition, the vendor was permitted to retain the slaves, and remain the ostensible owner, might give some claim to a party, deceived thereby—yet Benson, who had legal notice by the notarial sale to the plaintiff, and to whose immediate predecessor notice and knowledge were given by Wallace, cannot possibly complain.

Benson's deed is not such a title as may enable him to prescribe under it, for he knew his vendor had no title.

There is no evidence of the alleged simulation.

The case of Price *v.* Curtis *et al.*, 6 *Martin*, 420, and Copelly *v.* Duverges, 11 *Ibid.* 641, have been insisted on. But in the first, the deed of sale did not state any delivery—and the latter was that of a sale anterior to the Code—the conveyance was of land, not of slaves.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas, for the plaintiff.

Bullard, for the defendants.

Hunter *v.* Smith. III, N. S. 109.

SIXTH District.

Answers to interrogatories cannot be divided.

Winkle *v.* Tyler. III, N. S. 111.

SIXTH District.

A vendee cannot resist payment on the ground that there are other persons who have titles to the land sold him, there being no suit brought, no certainty that these persons will ever disturb him, nor any means of trying whether their titles are better than his.

Bird *v.* Bowie. III, N. S. 112.

If the answers to interrogatories are evasive, the cause will be remanded.

SEVENTH District.

PORTER, J., said :—The defendant propounded two questions to the plaintiff: Whether he had not received the negro mentioned in the first interrogatory, at 1200 dollars, or if not, at what sum had he agreed to take him? The answer furnished a reply to only one of these questions, namely: that he had not received him at 1200 dollars. In this it was clearly defective, but the plaintiff contends this defect has been cured by an answer given to another of the interrogatories, by which it is stated that the negro was not delivered in payment of the principal sum due, but the interest which had accrued on it. And he insists the amount was immaterial, because it could not be used in this action as a defence, or if material, that the answer is sufficiently explicit, because it states it was the amount of the interest due at the time the slave was received.

In this reasoning, which is sufficiently ingenious, this court cannot concur. It seems to us to take for granted in favor of the party answering, the very thing which it was the object of the interrogatory to disprove. From the pleadings, and the drift of the plaintiff's answers to the questions proposed to him, it appears that one of the points principally disputed between the parties, was, whether the negro had been given in payment of the principal sum due by the

obligation, or in discharge of some subsequent engagement entered into with regard to interest. Now, negativing the fact that it was given in payment did not justify an evasion of the interrogatory, which called on him to state at what amount the slave was delivered. To ascertain the truth in regard to the point at issue, the sum at which the negro was received, was very material. It might have shown so high a price, as to have rendered it improbable he was given as a compensation for the delay in the payment of the original debt, or if given on that account, that the contract was usurious. When the party interrogated fails to answer according to law, it lies on him to show, that the information he has disclosed to other questions, fully and satisfactorily cures the defect, and places the opposite party in the same situation, in which a categorical reply to the interrogatory propounded would have put him. One of the best means of getting verity from reluctant witnesses, and arriving at a correct knowledge of the matters on which they testify, is, by minute interrogation on particulars. A party in a suit who wishes to probe the conscience of his adversary, has the same right, and perhaps a greater necessity, for applying this test, than when examining a witness who is presumed indifferent. The answer excepted to in this instance, is liable to all the objections that a regard to this rule can suggest. It evades particulars, and endeavors to cure the evasion by a general answer to another question, which answer can only be a reply to this, on the supposition that the plaintiff could have answered the particular interrogation, in such a way as would have produced the same result.

The exception made to the reply to the fourth interrogatory does not appear to be supported. The question was general as to the consideration, and the answer fully meets and satisfies it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that this case be remanded for a new trial, with direction to the district judge to ascertain the exception filed by the defendant to the plaintiff's answer to the second interrogatory. And it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Scott, for the plaintiff.

Oakley, for the defendant.

Ware *v.* Innis. III, N. S. 117.

SIXTH District.

Decided, that the forfeiture of the right to recover, on account of having seized and taken property from the defendant, to satisfy the amount claimed by suit, a principle of Spanish law, (*N. Recopilacion, b.* 4, *tit.* 18, *l.* 1, and *b.* 5, *tit.* 17, *l.* 10, of same work,) only takes place in consequence of a taking with force, as it was the intent of the law maker to prevent breaches of the peace.

Innis *v.* Kemper. III, N. S. 119.

SIXTH District.

It will not be allowed to a freeholder who has signed a return for a road under the *jurat* of a justice of the peace, afterwards to prove that he was not sworn. This establishes that the oath was taken—but, it is urged, this does not *show* it was taken before they proceeded. This circumstance would not vitiate the proceedings. Nott *v.* Daunoy, 1 *Martin, N. S.* 1.

Stafford *v.* Calliham. III, N. S. 124.

SIXTH District.

A new trial refused, because the party applying for it, had not used due diligence to procure the missing evidence.

Bacon *v.* M'Nutt *et al.* III, N. S. 129.

If a probate sale be made to satisfy a mortgage and the mortgagee become the purchaser, he will be allowed to retain the price.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff, as widow and tutrix of her minor children, demands from the defendant, surety of W. Murray, the price of a lot in the town of Alexandria, purchased by the latter, at the sale of her husband's estate.

The defendant pleaded the general issue, a mortgage on the lot and confession of judgment in favor of his principal, a compensation of a claim of the latter against the estate, and a plea of discussion.

Murray interpleaded, denied all allegations; averred the claim was extinguished by compensation or payment; prayed the defendant being a foreigner should give security, if any thing was recovered, as other persons were interested in the estate.

There was judgment against both principal and surety; but execution was directed not to issue, till the plaintiff gave security to indemnify the defendants against an hypothecary claim of Ferguson & Rich, and not against the surety till after the discussion of the property of the principal pointed out by the surety.

The plaintiff appealed.

The documents that come up are process verbal of the sale of E. Bacon's estate; the petition to, and order of the parish judge, the receipt of Murray, vendor of E. Bacon, for a partial payment.

The defendants introduced the record of a suit, Ferguson & Rich *v.* Bacon, the present plaintiff, and the subrogation of Murray to the plaintiffs' rights.

Scott deposed that the note, offered in compensation, is one of those given in payment of the lot, as well as that filed in the suit of Ferguson *v.* Rich, both being secured by a mortgage on the lot.

It is urged that Murray purchased at a sale, ordered by the court of probates, for the purpose of reducing the property of the estate into cash, so that the debts might be paid out of the proceeds, according to their respective classes; and that, therefore, there cannot be any compensation allowed, and the district court erred in allowing any.

This does not appear to have been a sale of the whole property of the estate, but the sale of a lot, and the avowed object not to reduce it into money to be distributed, but to sell on credit so as to get a

higher price and the sale is only authorised, as prayed for, to avert the loss to the estate and perhaps to the mortgagee; that would result from a cash sale. It is not even averred that there are other debts, and it is that there is other property. The district court did not err in considering the sale as made for a particular object, that of satisfying the mortgage on the premises. If so, nothing is more just than to allow the mortgage creditor, who has become a purchaser, to retain in his hands, the produce of a sale, actually made to pay him. It appears that Murray, in his own right and as subrogated to those of Ferguson & Rich, is the only hypothecary creditor. The judge, therefore, acted correctly in allowing the claim for compensation.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

Wilson, for the plaintiff.

Bullard and *Scott*, for the defendants.

Taylor *v.* Curtis. III, N. S. 132.

A man's solvency cannot be better tested than by the return of an execution against him, on which no property can be found.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The defendant transferred to the plaintiff, part of a judgment which he had recovered against one A. J. Davis, with an express warranty of his solvency; the money not being made on execution, this action has been brought against the defendant as transferror and the only question presented for decision is, whether it has been shown that Davis was insolvent.

The transfer bears date the 22d of November, 1822. On the 17th of January, 1823, the plaintiff issued execution against Davis on the judgment, and on this execution only sixty dollars could be made which the defendant received. On the 22d of the month last mentioned, Davis presented his bilan and prayed for a meeting of his creditors in order that he might make them a cession of his goods: and shortly after died.

In addition to this evidence, parol testimony was introduced to

show that Davis was insolvent, and that every thing he had was mortgaged for other debts.

We think the plaintiff is entitled to recover. The defendant, in warranting the solvency of Davis, warranted his ability to pay, and this ability could not have been better tested, than by the application of an execution, which proved unavailing. The defendant has contended that Davis was not insolvent, because the schedule filed by him shows that he had property and debts to a larger amount than that which he owed. There are few insolvent debtors, who do not present such statements, and there are few of those statements that do not prove delusive; but whether that relied on here, would have been an exception to the general rule, we deem immaterial in settling the present question. It was not the understanding of the parties, nor is it our understanding of the law, on such a contract as this, that the transferee is to await the settlement of an insolvent's estate, before he can have recourse on his transferror. The evident meaning of the agreement was, that Davis was able to pay the debt in due course of law, and that the means of compelling him should have been resorted to. The obligations of sureties, who contract in the ordinary way, furnish a fair analogy for ascertaining the right of the parties, now before us. They, like the defendant, agree that the person, for whom they bind themselves, is solvent, and that he will pay the debts he has contracted, and they can require his property should be discussed, before recourse is had on them; but they cannot compel the creditor to do so, when that property is in litigation, or the debtor has sued to make a cession of his goods. On the whole, we think, that the plaintiff, on his failing to make the money out of the debtor by due course of law, had a right to sue the defendant on his warranty.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the plaintiff do recover of the defendant 700 dollars, with interest thereon, at five per cent. from the 25th of November, 1822, until paid, and costs of suit in both courts.

Bullard, for the plaintiff.

Thomas, for the defendant.

Waters *v.* Wilson *et al.* III, N. S. 135.

A curator, or beneficiary heir, ordered by the court of probates to pay a debt, may be sued in the district court.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The petition states that the estate of the late James H. Gordon was indebted to the plaintiff, in the sum of 869 dollars, 71 cents: that this debt has been classified by the judge of probates of the parish of Rapides as a privileged debt: that notwithstanding this classification, the defendants, though often requested, have refused to pay the same. It concludes by praying for citation, and judgment for the amount ascertained, and settled by the court of probates.

The answer contains a plea of payment, and the general issue. Judgment was given in the district court against the defendants in their personal capacity, and they have appealed.

In this court the appellants have assigned for error, that the district court had not jurisdiction of the case: and that this jurisdiction being a want of power in relation to the subject matter, may be shown at any time before final judgment.

The appellees insist that the exclusive jurisdiction of the court of probates, only relates to the examination and classification of the different claims against the estate; and that these objects once obtained, an action can be maintained before any of the ordinary tribunals, to recover the amount due.

The provisions in our Civil Code, in relation to the settlement of estates, administered by curators, or beneficiary heirs, seem altogether to proceed, on the apprehension, that the curator would pay too soon, and that the absent creditors would be injured: for there is not a single provision in it, which provides the means of quickening the representative, in the discharge of his duties, by compelling him to publish the account of the classification, and place the estate in a situation for discharging its debts: nor any which speaks of or indicates, the form of execution that should issue against him. In practice, however, we believe it has been customary for the court of probates, after classification of the debts, to order the curator to pay them. The judge, in the instance before us, acted on this idea; for we find in the record, that he ordered the defendant to pay the debts which were classed, out of the funds in hand; and the correctness of this order cannot be inquired into now, for no appeal was taken from it. Under a late act of the legislature he has the power to enforce such

decrees; for it declares, in express terms, "that the court of probates shall have power to issue all such writs and mandates as may be necessary for the execution of its orders, judgments, and decrees." Acts of the Legislature, 1820—96, sect. 9.

Had, therefore, this suit been brought since the passage of the act referred to, we should be strongly inclined to believe it could not be maintained. But it is not that question but another, which is now before us; and that is, whether antecedent to the passage of this law, a curator, or beneficiary heir who failed to comply with an order to pay the creditors, after classification, could be compelled to do so by an ordinary suit. For the solution of the question, it becomes necessary to look into the situation of the estate at the time the order was given, and what were the powers of the court in relation to it. By law, the whole estate is directed to be sold, and the proceeds are presumed to be in the hands of the administrator. No execution, therefore, could issue against the property of the succession, and the only means, which the court of probates could have used, would have been some written process, which might have compelled the representative of the estate to discharge the personal responsibility he had incurred.

Now, previous to the passage of the act already referred to, it does not appear to us that such means were placed within the reach of that tribunal: indeed the very enactments there made on the subject matter, must have proceeded on the idea that such powers were not possessed by the court of probates, and that it was necessary to confer them. What then was the consequence of the probate court wanting means to enforce its orders? That the curator or beneficiary heir could retain the funds, he was ordered to pay over to others so long as he pleased? We think not. We consider his failure to comply with an order given against him in his representative capacity, created a cause of action which made him responsible in his personal; and that the action might be prosecuted either by a suit on his bond, or by setting out the particular sum due, as in the present instance.

None of the means of defence set up in the answer have been sustained by proof, and we discover no error in the judgment except a small one in calculation, and the circumstance of the decree being against husband and wife. We see no evidence which makes him responsible for any act done in relation to the estate, and he is certainly not bound to pay the debts contracted by his wife before coverture.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and proceeding to give such judgment as should have been rendered there, it is ordered, adjudged and decreed, that the plaintiff do recover of the defendant, Maria C. Wilson, the sum of 434 dollars, 21 cents, with interest from judicial demand until paid, and costs in the court below, the appellee paying costs in this.

Baldwin, for the plaintiff.

Wilson, for the defendants.

Trustees of Natchitoches *v.* Coe. III, N. S. 140.

SIXTH District.

This is an action brought by the corporation of the town of Natchitoches to have a house, built by the defendant on the bank of Red River within the limits of said town, removed as a nuisance. Defendant excepts, that as by the act of 1819 and 1820, the corporation has been invested with all the powers of a police jury, and that the confirming of these powers gave to the corporation the right of enforcing any regulation they might make and removing a nuisance; therefore the district court had no jurisdiction of the case: *Held*, that the district court is not thereby ousted of its jurisdiction. No ordinance is produced showing how means have been provided for hearing and determining cases of this kind, and appellant complains with an ill grace that his adversary is not his judge. As to the merits, see *Partida*, 3, 28, 7; *Curia Phil. l.* 3, *c.* 1, *n.* 16.

Davis *v.* Curtis. III, N. S. 142.

SIXTH District.

Appeal dismissed for lack of a bond for costs.

Crawford *v.* Cheney. III, N. S. 142.

SIXTH District.

In a suit for killing a slave presumptive evidence supports the verdict.

Crain *v.* Robert. III, N. S. 144.

SIXTH District.

Judgment confirmed with damages against defendant, appealing without evidence to support his plea.

Same *v.* Same. III, N. S. 145.

SIXTH District.

Claim disregarded because supported by vague proof.

Held, novation is never presumed. Civil Code, 296, art. 174.

Campbell *v.* Miller. III, N. S. 149.

Campbell *v.* Henderson. III, N. S. 152.

SIXTH District.

When the law of the country in which the parties contracted is not set forth, the court must take that of the state as their rule.

When the cause was tried by a jury below, and the judgment is reversed, it is sent back, although there be sufficient evidence to act on.

Henderson for the use of Hunter *v.* Bowles. III, N. S. 152.

A judge need not in all cases refer to the law which he decides.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This case has been submitted without argument.

On examining the record, we find the action was commenced on a note of hand, the execution of which was clearly established, on the trial in the court below.

No matter in avoidance was pleaded, and nothing, appearing in evidence, creates the slightest doubt of the justice of the plaintiff's claim. To excuse an appeal taken in so plain a case, the defendant has relied in this court on two points.

1. That no amicable demand was made, and consequently, there was error in giving judgment for the plaintiff with costs.

2. That the judgment refers to no law, and is therefore unconstitutional and void.

I. An interrogatory is annexed to the petition, calling on the defendant to say whether an amicable demand was not made of him; to

[Henderson for the use of Hunter v. Bowles.]

this no answer has been made, and the fact, endeavored to be established by it, must be taken as confessed. It is said in the note filed by appellant's counsel in the record, that a denial of this fact by an agent, though not made on oath, is sufficient; because the petition was served at the last place of residence of the appellant, a position, so clearly untenable, that any reasoning on our part to show it such, is deemed unnecessary.

II. This point is of the same character as the first, that is, wholly unsupported by law. The objection made to the judgment has been more than once taken in this court, and always without success. A judge must, in all cases, give reasons for his judgment, because it is impossible he can conscientiously decide against either party without some, but he is not obliged to cite the particular law, on which his decision is founded: he may be well acquainted with its spirit, meaning and force, and yet not recollect its words, nor the chapter or page in which it is found. Thus the constitution requires judges to refer, as often as possible, to the particular law, but in all cases, to adduce the reasons on which their decrees are founded. 10 *Martin*, 162; 4 *Ibid.* 536.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per centum on the amount of said judgment, as damages for the delay occasioned by this appeal.

Thomas, for the plaintiff.

Oakley, for the defendant.

Ham v. Herriman. III, N. S. 155.

SIXTH District.

The question of fraud is of the peculiar province of the jury.

Grafton *v.* Collins. III, N. S. 156.

SIXTH District.

If an overseer be dismissed for misconduct, he can only recover for the time he served.

Cox *v.* Wells *et al.* III, N. S. 158.

SIXTH District.

The return of the sheriff that he served petition and citation, is sufficient to show that he served it in both languages. Where forty-eight jurors had been drawn, but only forty-five could be summoned, this does not vitiate the venire.

Prudhomme *v.* Dawson *et al.* III, N. S. 161.

Under the Spanish law, valuation in the contract of marriage did not transfer property to the husband.

Prescription does not run against the wife in favor of the purchasers of her property, although separated.

Purchaser is not necessarily in bad faith from the inception of suit.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff, wife of D. Cass, but separated in goods and autho-

rised by him, charges she brought in marriage and as her *dot* sundry slaves, part of whom are in the respective possessions of the defendants, and have been so since the year 1810, without either of them having title, and they refuse to return them or account for the hire of them.

The defendant Dawson pleaded the general issue, title by purchase and prescription.

The defendant Rachal pleaded title, in himself, that the slaves brought by plaintiff in marriage were estimated in her marriage contract and thus became the husband's absolute property.

There was judgment for the defendants and the plaintiff appealed.

Two questions arise in this case, whether the marriage contract vested the property in the husband? Admitting not, whether the plaintiff's claim is barred by prescription? This last question applies only to the defendant Dawson.

The contract states that the parties are possessed of property to the value of 3000 dollars, each; that all the property of the contracting parties, now in possession or action, shall be put into the husband's hands, to be by him employed for their mutual advantage; and that the said common (mutual) property, with its increase, shall, on the death of the parties, be divided among their common issue, and if there be no such issue, to the heirs of the survivor, or the person, in whose favor he may dispose of the same.

The marriage took place before the promulgation of the Civil Code. We think it clear that the total value of the property of the parties mentioned in the contract, was intended solely to establish the equality in value of what they brought. The contract speaks of the property they brought, as being common, mutual and managed by the husband for the joint advantage of both.

Under the Spanish law, it was not every valuation which transferred the property of the wife's real estate to the husband. Febrero speaks of valuations, which have not the effect of a sale, *estimacion en que no causa venta.* He says the valuation has this effect when it is held in such a manner that the dotal effects are given to the husband, as sold at the price they were valued at. *Quando se aprecian de tal suerte, que se entregan al marido como vendedor en que se valuen. Febr. librer. de. es. ch. 2, sect.* 1, *n.* 8 and 9; *Part.* 4, 11, 20.

2 It is true the defendant Dawson would be protected by the plea of prescription, if the plaintiff's marriage had been dissolved at the time of the separation of property: as the marriage still subsists, the wife must be protected, because her action may be prejudicial to her husband. Civil Code, 486, art. 14; Sirey 2, 30; 17 *Ibid. p.* 1, 304.

There is a bill of exceptions taken by the plaintiff's counsel to the opinion, in allowing the plea of the defendant Rachal, that the authorisation of the plaintiff's husband was not filed with the petition. Notwithstanding which the judge permitted her to proceed to trial.

On the objection being taken, the authorisation granted before the inception of the suit was produced. The authorisation was set forth

in the petition, and we think that its being produced as soon as called for sufficed. Besides, the judge by allowing the plaintiff to proceed to trial, virtually overruled his former decision, and no exception was taken to this change of opinion.

We do not think the defendants bound to pay for the hire. They are not necessarily to be considered in bad faith from the inception of the suit. Civil Code, 102, art. 7. The Code has wrought a change in the former law, which put an end to the good faith on the judicial demand. Richardson *v.* Packwood, 1 *N. S.*, 405; where the subject is examined at full length.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff recover from the defendants respectively the slaves named in the petition, and that the defendants pay costs in both courts.

Morris and *Rost*, for the plaintiff.

Bullard and *Holkam*, for the defendants.

Compton *et al. v.* Patterson. III, N. S. 164.

SIXTH District.

An appeal lies from a judgment of nonsuit, so of discontinuance. The endorser cannot make the payee a party, and propound interrogatories to him to attack the consideration.

Collins *et al. v.* M'Crummen *et al.* III, N. S. 166.

SIXTH District.

A witness who acknowledges he is responsible for costs, but has means secured to pay them, is not incompetent.

[Collins *et al. v.* M'Crummen *et al.*]

A note endorsed by one partner, does not render the endorsee responsible to the firm for laches. The goods sold need not be described in the petition when the defendant has assumed payment of the amount.

Loccard *v.* Bullitt. III, N. S. 170.

SIXTH District.

The court, not the party, must judge whether due diligence was used to procure testimony.

Heirs of Gague *v.* Gague *et al.* III, N. S. 172.

SIXTH District.

Heirs may sue the widow in the district court for a partition of the common estate. The Civil Code, 176, art. 133, in giving jurisdiction to the court of probates does not give it exclusively. Turner *v.* Croft, 1 *N. S.* 370; Broussard *v.* Bernard, *ante*, 14.

Fournier *v.* Landreau. III, N. S. 173.

SIXTH District.

Laws are not presumed to have a retrospective operation: so, of the act of 1st March, 1822.

EASTERN DISTRICT, DECEMBER TERM, 1824.

Pascal *v.* Caldwell *et al.* III, N. S. 175.

FIRST District.

Judgment of court below on questions of fact prevails, unless clearly erroneous.

Holliday *v.* M'Culloch *et al.* III, N. S. 176.

FIRST District.

In this case no service of petition was made on defendants, nor on any person representing them, but on an application of plaintiff's counsel, suggesting that they lived in Maryland, an attorney was appointed to represent them. The action was for an account and settlement of partnership, sale of partnership property and distribution of surplus. The attorney excepted to the jurisdiction and the court below sustained it.

[Holliday *v.* M'Culloch *et al.*]

PORTER, J., said:—

It does not appear to us the judge erred.—We have been unable to find any provision in our law which authorises the course of proceeding the plaintiff has pursued. By the 12th law of the 2d title of the 3d Partida, it is enacted that if a person, against whom suit is intended to be brought, should be absent, the plaintiff may petition the judge of the place to appoint one or more curators. Our own Code has pointed out the cases in which curators ought to be put in possession of the estate of absent persons. Whether the defendants be in that situation is an inquiry not necessary to be gone into here, as the appointment was not made to the estate before suit commenced, but to defend the action, and the defendants were no otherwise in court but by the order of the judge directing an attorney to defend them. The article of our Code which authorises the judge to appoint proper persons to defend the rights of an absentee, limits the power to cases where there is a suit pending, in which his right may be involved, and does not extend to a suit instituted directly against the person. Such was the construction put on this article in the case of Astor *v.* Winter, Civil Code, 14, art. 8. 8 *Martin*, 206.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Livermore, for the plaintiff.

Pierce, for the defendants.

Hyde *et al. v.* Henry. III, N. S. 179.

FIRST District.

Defendant having requested plaintiff to make some advances, such as "the necessary expenses of the vessel in coming into the bayou:" *Held*, these are not confined to the toll in coming in, but to all needful disbursements till her return.

Jenkins *v.* Tyler III, N. S. 182.

PARISH Court of New Orleans.

An order of seizure and sale cannot be executed after the death of the debtor, although it may have been obtained during his life. But the creditor is entitled to his costs up to the time of the debtor's decease.

Hepp *et al. v.* Ducros *et al.* III, N. S. 185.

An agreement to pay ten per cent. on the purchase-money for three years, which is afterwards extended to the fourth year, does not entitle the creditor to interest at this rate, on further indulgence.

The buyer owes interest on the price of slaves from the time the debt becomes due.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit was instituted in the court below, to recover the price of certain slaves, in pursuance of a contract of sale, as set forth in the petition of the plaintiffs; who being dissatisfied with the judgment therein rendered, took the present appeal: since the filing of which, the defendants and appellees in their answer, complain also of errors in the judgment of the district court.

The questions in the case, raised by both parties, relate to the calculation of interest on the price promised for the slaves. According to the stipulations of the act of sale, the purchasers had a right to prolong payment for the space of three years, by paying an interest of ten per cent. per annum on the capital.

The evidence in the case shows that, using the privilege thus accorded to them, the payment was postponed, not only for three but four years, for which time interest was calculated and paid from two years to two years, purporting to be at the rate of ten per cent. per annum, on a capital of 38,000 dollars. The judge *a quo* seems to be

of opinion that there was error in the estimate of interest as calculated, to the prejudice of the debtors; and in rendering judgment imputed the surplus to the payment of part of the principal.

This is complained of by the counsel of the appellees as erroneous; but we are of opinion that the judgment is thus far correct, after allowing to the creditor the most favorable mode of calculation which can be legally tolerated. The other error, alleged on the part of the appellants, is a departure from the true spirit and just interpretation of the contract, in not allowing interest at the rate of ten per cent. from the period of the last payment up to the time of rendering judgment, instead of legal interest.

Ten per cent. per annum, on a capital sum either loaned, or for which a debtor may be indulged in the payment, is allowed by express convention between the parties, which must be in writing. Civil Code. 408, art. 32.

In the present case, the conventional interest, by the act of sale, is limited to three years; but the parties to that deed have, by a subsequent agreement as evidenced by the last note and receipt for the payment of interest, extended it one year more; and this is contended to be a good and substantial reason for the court to extend it still farther, to end only by the payment of the capital; because it appears to be the interpretation given to the contract by the parties themselves. The original agreement is explicit and needs no interpretation: it limits the conventional interest to three years, which was to be paid as a consideration for the forbearance on the part of the vendor to demand the price at the time it became due. This contract was reciprocal and valid up to that period, it then ceased, and left the capital debt precisely as it would have stood without that stipulation. The payment of ten per cent. for the fourth year was on a subsequent agreement, the force of which expired with that year.

The court below did not err in refusing to allow ten per cent. after that period.

The only question remaining to be settled concerns the allowance of legal interest; whether it should be from the period at which the price of the slaves became finally due, or from the judicial demand?

On the subject of this species of interest, it is perhaps desirable, that it should be based on the forbearance of a creditor to enforce payment, and not on the qualities or properties of the things for which debts may be contracted. For as the law now stands, courts of justice are frequently forced into unprofitable inquiries, as to the capacity of different kinds of property to produce rent or revenue.

The debt claimed, now in the case under consideration, is the price of a number of slaves of both sexes, and various ages, and consequently calculated to produce profit to the holder by natural increase, as well as by manual labor. In the first place they may be assimilated to a herd or stock of cattle, one of the examples given in Pothier on the subject. *Cont. de Vente*, 283.

According to the provisions of our Code, legal interest runs on the

price of the thing sold producing fruits or any other income. Civil Code, 360, art. 84.

Independent then of the possibility and probability of natural increase in a gang of slaves of different sexes, the hire of their labor, and consequent income to the holder, or profits derived from it when directed by the owner himself, would authorise a demand, on the part of the seller, of interest on the price after it becomes due.

We have been unable to discover any error in the judgment of the district court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Hennen, for the plaintiff.

De Armas, for the defendants.

EASTERN DISTRICT, JANUARY TERM, 1825.

Herman *v.* Sprigg. III, N. S. 190.

If the sheriff, in copying a citation, insert words not in the original, it will not be void on that account.

Contracts in which usury intervenes are void, but the lender may recover back the money loaned.

Subsequent laws do not operate a repeal by containing provisions *different* from former ones: they must be contrary to them.

The borrower is not obliged to pay legal or other interest on money *received* on a usurious contract.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action commenced in the usual form, by the plaintiff, endorsee of a promissory note, against the defendant, maker thereof. The instrument is negotiable, and was made payable to one William Flood, who since the execution of it, is deceased, and by whom it was endorsed to the petitioner.

The defendant pleads,

1. An exception to the process of citation, because a copy of it was not served according to law.

2. A general denial of all the allegations in the petition.

3. That the petitioner obtained the note, on which this suit has been commenced, by unfair means, viz: by an usurious contract—that the defendant never received any valuable consideration for it,

the same having been executed for the accommodation of the payee. That the plaintiff had already commenced suit against the endorser's estate, and that it is to his succession alone resort can be had for payment.

The first question for our decision on these pleadings, is the legality of the service of citation.

The illegality is said to arise from a variance between the original and the copy, and it consists in this: That in the original the defendant is cited to appear "at the office of the sheriff of the parish of East Baton Rouge, and comply with the prayer of the petition, or file his answer in the office of the clerk of the third district court, holden in and for the parish aforesaid, at the town of Baton Rouge." That the copy cites him to file his answer "in the office of the clerk of the district court holden for the parish ———, at the town of Baton Rouge," leaving out the word "aforesaid," which in the original refers to the parish of East Baton Rouge; and that there is also a variance in substituting the word "at," for those of "in" and "for."

This objection is purely technical, and goes to matter of form alone. For we apprehend, the defendant had little difficulty from the copy served, in knowing where he was cited to, and what he was required to do. There being but one district court appointed by law to be held at the town of Baton Rouge, and that being the court which sits for the parish in which the village is situated; a notification to file an answer with the clerk of the district court sitting in that town, could not be misunderstood to be a citation to file it with the clerk of the district court for that parish; because there was only one court of that style and description, which held its sessions there. Technical, however, as the objection is, the law requires a copy of the citation to be served on the defendant, and we are not prepared to say what effect a variance between that copy, and the original would have, were it not that on a comparison of the process here issued, with the form prescribed by the act of the legislature, we find that the original contained more than that act prescribes, and that the copy exactly pursues it.

The form directed for citations, by the act establishing the superior court, which form has been preserved by subsequent statutes for the district court, requires the defendant "to file his answer in writing in the office of the clerk of the superior court at —— in —— days after the service." The original in this case went further, and mentioned for which parish the court held its sittings there. This was more than was necessary—but *utile per inutile non vitiatur*, and it was not void on that account. The sheriff, however, was not under the necessity of copying any part of it, which was mere surplusage. It was sufficient to give the defendant a notice, as special as the form set forth in the statute. If it contained all that was required by the act, it was not in our opinion void, because it did not contain something more.

This brings us to the merits, for we deem it unnecessary to notice

particularly the objection, that the plaintiff must look to Flood's estate for the payment of this note—a plea that the endorsee of a promissory note must pursue the endorser alone, and cannot recover against the maker, because he has commenced an action against the party who transferred it, we believe to be without precedent, as it is certainly without either reason, or law, to support it.

The first question to be decided is, whether the contract by which the plaintiff obtained an interest in the note sued on be void? If it should turn out to be so, he of course has not acquired a legal right or title to the instrument sued on.

On this point we have not any doubt. It most clearly appears, by a reference to the various laws of Spain in relation to usury, that contracts, in which it took place, were considered as null, and of no effect. Such also is the opinion of the most esteemed commentators on these laws, that we have been able to consult.

To cite in support of this conclusion, the various statutory provisions, by which from time to time the several monarchs of Spain endeavored to prohibit the loan of money at illegal interest, is unnecessary; we deem it sufficient to refer to a provision contained in one of the latest edicts on this subject. We allude to that of Philip the 3d, promulgated in 1608, in which, after prescribing the penalties, that both borrower and lender are liable to, who enter into usurious contracts; it declares, *que sea en si ningun, y de ningun valor, ni effecto, qualquier contrato, o concierto, que contra lo susodicho se hiciere; para que de acqui adelante no valga ni se use de el, so las dichos penas.* "That every contract, or agreement, which shall be made against the foregoing, shall be null and of no value; and that henceforward, no one shall avail himself, or profit by such contracts, under the penalties already mentioned." *Novisima Recop. lib.* 10, *tit.* 1, *l.* 21, which is, *Ley.* 15, *tit.* 18, *lib.* 5, *Nova Recop.* The clear and positive manner, in which the legislator has thus expressed his will, dispenses with the necessity of construction, or rather leaves no room for it. But in a case of so much importance to the parties and expectation to the public, we refer to the following authorities, to show, that our understanding of the law, is that of the jurists of Spain:

Los contratos e instrumentos publicos, en que interviene usura, son nulos. Curia Phil. lib. 1, *cap.* 1, *no.* 36, *verbo Usura.*

"The contracts and public acts, in which usury intervenes, are null."

"*Son nulos y no trahen aparajada execucion todos los contratos en que interviene usura.*" *Febrero, p.* 1, *cap.* 4, *sect.* 2, *no.* 37.

"The contracts in which usury is practised are null, and do not carry with them the force of the thing judged." To the same effect is *Siguenza, lib.* 1, *cap.* 11, *no.* 22.

The next inquiry is to what extent is the contract null? Is it so, both for the principal sum paid, and interest, or only for the interest received? This is the point, which was most contested in argument,

on which the most doubt exists, and on which our most serious attention has been exercised.

The counsel, who contended for the nullity of the entire contract, relied on the provision already cited of the *Novisima Recopilacion*, and others of the same tenor and effect, which are found in that work. Among these is a clause in one of the penal statutes of Spain, which provides, that the principal sum in the contract shall be decreed to the party upon whom the usury has been practised, *la suerte principal sea para la parte contra quien se exercitaren las usuras.* From this provision he argued, that if the principal sum in the contract was given to the borrower, he might well offer, as an exception when sued, the rule of law which shows the money to belong to him, and which money would be decreed to him, in a different action. *Novisima Recopilacion, lib.* 12, *tit.* 22, *ley* 4, which is, *ley* 5, *tit.* 6, *lib.* 8, *Nova. Recop.*

Admitting this argument to be entitled to much weight, in an ordinary case, it might still be doubted, whether the defendant, in the suit before us, could avail himself of this provision, for he was not the person, upon whom the usury was practised; it was the endorser who transferred it, that was the sufferer. But we are saved the necessity of examining this question; for, by a subsequent pragmatic of Phillip the 3d, (which is the law we have already cited as to the nullity of the contract,) this provision is repealed, both borrower and lender are declared to be culpable, and a different distribution of the penalties is directed. See, also, *Curia Philip. lib.* 2, *cap.* 1, *n.* 40, *verbo Usura.*

We have then the question presented on the general provisions found in the laws of the Recopilacion, on the subject of usury. These laws declare that the usurious contract or agreement is null and void. If they stood alone, we would perhaps feel compelled to say what we have often said: that where the law did not distinguish we should not: and that, as the payment of the principal sum made a part of the original contract, it fell within that provision, which declared that contract void.

But there is an earlier statute to be found in the laws of Spain, than any we have yet referred to, which has a most important bearing on the true construction of the subsequent enactments, on the same subject. It is the 31st law of the 11th title of the 5th Partida.

Veinte maravedis, o otro, recibiendo promission del, quel de treinta maravedis, o quarenta por ellos tal promission non vale, nin es tenido de la cumplir el que la face, si non de los veinte maravedis que recibio, esto es, porque es manera usura.

"If a man gives twenty maravedis, or any other sum of money, and receives from one a promise to return thirty or forty, such promise is not valid: nor is the obligor bound to perform it, except for the money received, because it is a species of usury."

By this law, then, we have a provision that a promise to give illegal interest is void. So far, it is in conformity with the provisions

subsequently enacted on the same subject on which the defendant relies. But it defines, by the latter part of the clause cited, what is meant by the contract being void. It limits the nullity to the amount of the interest promised; and declares that, as to the money paid and received, it is binding, and may be enforced.

Has this provision been repealed? We think not. We have carefully examined all the laws that treat of the same matter, and find nothing which would justify such a conclusion. They, in general terms, declare contracts for illegal interest, void. So does that of the Partida already cited. The re-enactment of a general provision contained in a former law, to which an exception was attached, does not repeal that exception; because the intention to repeal is never presumed, and both provisions may well stand together. *Toullier, Droit Civil Francais, vol.* 1, 120, *no.* 154. It is true, these statutes contain additional regulations for the prevention of usury, to those found in the law of the Partidas; but there is no rule of construction better established, than that subsequent laws do not operate a repeal, by containing provisions different from former ones. They must be contrary to them. There are few which this court has had occasion more frequently to recognise. It is a principle, says a modern author, to whom all who are in search of truth on legal questions, may recur, with a certainty almost, of finding it on every subject on which he treats, that the dispositions of anterior laws, not contrary to those which are posterior, are understood to exist in the latter, and make a part of them. *Posteriores leges ad priores pertinent nisi contrariæ sint. Toullier, vol.* 1, 122 and 124, *nos.* 156 and 157; *Dig. lib.* 1, *tit.* 3, *l.* 28; De Armas's Case, 10 *Martin;* 12 *Ibid.* 697; 1 *Martin, N. S.* 160; 2 *Ibid.* 32.

Applying this rule to the laws already referred to, we are satisfied that that of the Partidas is not repealed, and that taking it as still making a part of the subsequent statutes, it compels the re-payment of the principal sum.

Were we doubtful on this question, the deference justly due to the concurrent testimony of the various commentators on the laws of Spain, would induce us to adopt their construction.

In the *Curia Philipica*, it is stated that usurious contracts are null; but this, says the author of that work, is to be understood as to the interest, and not as to the principal sum, according to the law of the Partidas. The law he refers to is that we have already cited. *Curia Phil. lib.* 2, *cap.* 1, *no.* 36, *verbo Usura.* Such is also the doctrine of *Febrero* and *Siguenza. Febrero, p.* 1, *cap.* 4, *sect.* 2, *no.* 36; *Siguenza, lib.* 1, *cap.* 11, *no.* 22.

The opinion just expressed leaves open another question, and that is, whether the money lent must be repaid with interest at a legal rate.

The plaintiff has contended that he has a right to recover the amount loaned, with interest at ten per cent. This position receives some countenance from one of the Spanish writers we have already

quoted, and it is also supported by one of the judges of the late Superior Court of the territory of Orleans. In a case similar to this, he decided, that, he "knew no other interpretation to be given to the word usury than the taking a greater rate of interest upon a loan than is fixed by positive law or established usage." Acting under this impression he held that the person, who had lent money at an illegal rate of interest, could recover the sum loaned, and ten per cent. for the use of tt. *Siguenza, loco citato,* 1 *Martin,* 7.

With this view of the subject we have, after the most mature deliberation, found ourselves unable to concur. Interest, by the laws of this state must be either conventional or legal. The first is by the agreement of the parties. The second by the commands of the law, in cases where it has deemed proper to afford compensation to the lender. Under which of these heads does the claim now presented fall? Certainly not under the latter, for the lending money on illegal interest, is not one of the cases in which legal interest is given by our statutes. Does it then come within the former? That we have seen results from the agreement of the parties alone. Where, then, is the consent of the borrower shown in this case to pay ten per cent. and that of the lender to receive it? The record exhibits no such evidence. But it is said, that as the former promised to pay eighteen per cent. it must be presumed, nay it cannot be doubted, that he would have been willing to give ten. This is perhaps true: it requires, however, two parties to a contract, and how stands the presumption on the other side? The very reverse of that by which assent is supposed on the part of the person taking the loan. Doubtless we would have the consent of the lender now, to take as much as he can get, but it is his consent at the time of making the contract, which must be looked to; and viewing it in relation to his intention then, there cannot be a question, that he would not have consented to receive the amount he is now willing to take. So far, then, as the assent of the parties, at the period of contracting, can be assumed as the basis, on which a modification of the rate of interest, is now to be made by this tribunal; it is clear that no such assent has been shown, or can be presumed.

The strongest argument which has suggested itself to us in support of the plaintiff's pretension, is, that a contract being shown for conventional interest, it is the duty of the court to give that contract effect so far as it is legal. But to this, we think there is a satisfactory answer. This contract does not consist of several parts, it is one, and entire; to pay interest at an illegal rate for the use of the money borrowed. Such agreement is, as we have already seen, null. If it be, then, it cannot be good in part, nor furnish the consideration for raising a promise to pay a lesser sum.

Admitting that it could, there would still remain an intrinsic difficulty, which could not, so far as we can see at present, be surmounted. By law, conventional interest must not only be agreed on by the parties, but the amount must be fixed by them. Civil Code, 488, art.

32. No rate has been established here, and we cannot make one. And if we attempted it, what rate could we affix, one per cent, or ten?

We could add to these arguments, others, which might be fairly drawn from the policy of the law; of the duty of this court to sustain it; and how poorly such a construction would give that policy effect. To sanction the claim set up, would in truth be virtually sanctioning an evasion of the prohibition; and encouraging the citizen in a violation of the law, by rewarding him with the highest rate of interest which he could have obtained, had he obeyed it. But we forbear to follow the subject any further upon general principles, for however unsatisfactory our conclusions may appear on these grounds, to the minds of others, there cannot be a doubt in relation to the judgment which this court should pronounce, when the question is placed on the following consideration.

We have already shown that by the laws contained in the *Novisima Recopilacion*, all contracts reserving an illegal interest are null and void, and it has been seen that were it not for the provisions of a statute anterior to those laws, it would be doubtful if these contracts would not be void, not only for the interest, but also for the principal. If that law, then, enables the plaintiff to recover any thing, it must also have its effect as to how much he can recover; and its provisions are positive, that nothing but the naked sum lent can be got back. *Part.* 5, *tit.* 11, *l.* 31.

It was insisted, that as the maker of the note had received a valuable consideration for it, he could not avail himself of the plea of usury, committed by others, and that he had no concern with the subsequent transactions between the endorser and endorsee. To this argument the answer given at the bar is conclusive. The endorsee, who sues on a promissory note, must show that the right and title of the payee has legally passed to him; that right cannot pass to him by a contract which is illegal and void. Consequently the plaintiff is without title to demand payment of the whole amount of the note. 1 Starkie, 385; Douglass, 736.

The sum paid by the plaintiff appears from his answer to an interrogatory to be 4851 dollars, and for that amount he is entitled to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant, the sum of 4851 dollars, with costs in the court below, the appellee paying those of appeal.

Eustis, for the plaintiff.

Hennen, for the defendant.

Gravier *v.* Gravier's Heirs. III, N. S. 206.

Gravier's Heirs *v.* Gravier.

Same *v.* Same.

He who has stipulated in favor of another may revoke the stipulation any time before acceptance. A party who alleges that writings produced against him are forgeries, is not obliged to disavow them formally, in order to be allowed to offer evidence of the fact.

If the heir who is present buys property as litigious, he cannot claim the increased value in case of eviction.

FIRST District.

PORTER, J., delivered the opinion of the court.

These three actions were consolidated in the court of the first instance, and the matters at issue in the whole of them were decided by one judgment.

They were commenced in the same order of time with that in which they have just been enumerated. The first was by John Gravier, who states in his petition, that he was a creditor of his brother Bertrand, at the time of his decease, in the sum of 15,045 dollars, and that for the purpose of securing the said sum he became the purchaser for the whole of his estate, for the sum of 34,338 dollars, 75 cents. That since the period of the adjudication, he has paid various debts of the estate, so that it is now indebted to him in the sum of 38,665 dollars, 10¾ cents, and that notwithstanding these facts, the representatives of the heirs have lately caused to be inscribed in the office of the register of mortgages the obligation and mortgage given by him at the time of the adjudication.

The petition concludes by a prayer that the mortgage may be cancelled, and the heirs of Bertrand Gravier condemned to pay the plaintiff the balance above stated, of 38,665 dollars, 10¾ cents.

Previous to answering the petition, the defendants had commenced two suits against the plaintiff, and in the answer filed after a general denial of all the facts alleged by him, they refer to the actions just instituted, and pray that they may be consolidated with this.

In the first of these actions, the heirs of Bertrand state, that in the year 1797, their ancestor died in New Orleans, leaving a large estate, real and personal.

That John Gravier, one of their co-heirs, caused all that part of the suburb St. Mary, and of the land situated in the back thereof, to be adjudicated to him for the price for which they were appraised in the inventory, to wit, for the sum of 31,798 dollars.

That the conditions of the purchase were, that the said John Gravier should account to his co-heirs for their respective shares, in the balance of the same.

And that although often requested, he had refused to pay to the petitioners the amount due them; but had filed in court an account, the vouchers of which he had refused and still refuses to produce.

They therefore pray for an order of seizure and sale against the property of John Gravier, to pay them the balance due on the adjudication of the estate of their ancestor, with interest from the 19th of December, 1798, and costs of the suit.

To this petition, the defendant, John Gravier, pleaded, that by the terms of the adjudication, he was obliged to pay the debts due by the estate; and that until it shall be shown by the plaintiffs that there is a balance remaining in his hands after the payment of the debts so due, they are not entitled to bring this suit.

That he has paid debts to a large amount beyond the price of adjudication. That there are yet debts due by the estate of Bertrand Gravier, and that until the same is satisfied, no right of action has accrued to the plaintiffs.

The second suit was instituted by the same persons. In their petition they state, that in addition to the property left by Bertrand Gravier, at his decease, there were debts due to the estate to the amount of 30,000 dollars, and upwards: That John Gravier was appointed to collect the same, and that he undertook to do so, but though often requested, he had refused to render any account.

They therefore pray judgment for their share of the said debts, which share they aver to be 22,500 dollars.

To this action the defendant pleaded in substance, as he had done to the first: That by the terms of his purchase, he was first to pay the creditors: That he had paid them to an amount far beyond what he had received from the estate: That there were yet heavy debts due by the succession, and that from all these considerations the plaintiffs were not entitled to maintain their action against him.

From these pleadings, it may be seen, that although the parties differ widely as to the merits of their respective pretensions, yet the points at issue are few and simple. They are in truth but these: 1st. One of law: Have the plaintiffs by the terms of the original contract a right to bring an action against the defendant? If they have, what is the balance due?

The force of the exception against the plaintiffs' right to sue, will be best understood by quoting the particular expressions used in the contract of adjudication. The decree after reciting, that the attorney of the absent heirs had consented that the property left by Bertrand Gravier, should be adjudicated to John Gravier at the price of ap-

praisement, proceeds to adjudicate the property to him upon his giving security and "*Con la calidad de satisfacer a los acreedores que resultaren, lo que legitamente se justificare deverseles; y tam bien a los otros sus coheredoros la parte que les pertenesca:*" "On the condition to satisfy such creditors as may appear and legally establish their claims, and also his co-heirs, the part which shall be coming to them."

From these expressions, it has been contended, that the condition, on which John Gravier took the property, was to pay the creditors of his brother's estate, and by doing so a contract was formed between him and them, which they may enforce, and which consequently cannot be revoked without their consent.

Other arguments were used and several authorities cited to show the plaintiffs had prematurely commenced their action; but the whole strength of the objection lies in the statement just made, and to its correctness our attention has been principally turned.

The counsel, who argued in opposition to this objection, drew his authorities principally from the Roman and French law; and he proved, to our entire satisfaction, that according to the received doctrines in both these systems of jurisprudence, the person who has stipulated in favor of another, may revoke it at any time previous to the acceptance of him, for whose benefit the promise has been taken.

The question is not so free from difficulty when examined, under the ancient jurisprudence of the country. A law of the *Recopilacion* permits in express terms a contract to be made for the benefit of a third party. It is the opinion of the Spanish commentators, that according to this law, the person in whose favor the stipulation is made, may maintain an action to enforce it. In this they seem to think a material difference exists between the laws of Spain and those of Rome.

But according to other writers on the civil law, this is a mistake. Merlin, who has examined the subject fully, and who cites a vast number of authorities in support of his opinion, shows, we think, satisfactorily, that the early established doctrine in the Roman jurisprudence, that no one could stipulate for another, was subsequently altered and modified by different edicts of the emperors: and in the late and more improved state of their laws, such contracts were authorised, and might be enforced by the third person, in whose favor they were made.

It seems, however, to be the opinion of the writers on the Spanish law, that such stipulations could not be revoked by the party receiving them, when the contract was made for his joint benefit, and that of the absentee. When it was for the sole benefit of the latter, as was the case here, some of them are of opinion that it might, and others that it could not. We incline to the former opinion. We found our conclusion on there being nothing express in the law on the subject. That it is clear, the party stipulating had such a right, when contracting under the Roman jurisprudence, whose general

provisions are the same as those of the Spanish. And that on a question of this description, where the law is silent, and reason speaks so loudly in favor of revoking such promises, we should favor the right to do so.

This very case shows in as striking a light as any that could be presented, how grossly unjust a different rule would be. Twenty-seven years ago, John Gravier received the property of his brother's estate on condition to pay the debts and deliver the surplus, if any, to the heirs. When called on, after such a lapse of time, to render an account, he says he has not complied with one part of his promise; and because he has not done that, he should not be obliged to perform the other. To permit him to use such a defence, would be allowing him to profit by his own wrong. If debts exist why has he not paid them? If there are none such, he should deliver to the heirs the balance. If it be uncertain whether there are or not, he ought not to hold the funds from the persons who are responsible for the debts, for if he can use that argument with effect now he might always use it in the same way. The terms on which he acquired, however, completely refute the pretension last mentioned. They were; to pay such creditors as might appear, and legally establish their claims. Appear, when? Within the time fixed by law for persons to administer estates. Any other construction would lead to the grossest absurdity and allow the purchaser, or rather administrator, to hold the property in his hands forever. 4 *Martin*, 409; 7, *Toullier, liv.* 3, *tit.* 3, *n.* 24 and 25; *Merlin, Questions de Droit, Stipulation pour autrui*, 1, 2, 3, 4, 5; 3 *Martin*, 247.

Before reaching the merits, another question of law remains to be disposed of. It is presented, by an exception taken to the introduction of certain witnesses of the plaintiffs. The defendant having offered notes and documents to establish that he was a creditor of Bertrand Gravier's estate, the plaintiffs averred they were forgeries, and to prove them such, introduced several witnesses, who swore that from a variety of reasons, they did not consider them to be executed at the time which they bore date, nor by the person whose signature they purported to bear. To such testimony the defendant objected, on the ground that no formal disavowal had been made by the plaintiffs to their handwriting, and that it could not be received on bare suggestion.

The defendant, in this objection, has mistaken the practice, and confounded the right of the party introducing the paper with him against whom it is produced. Proof by experts, or comparison of hands, cannot be resorted to by the former, unless formally denied by the maker; but if introduced and proved, the opposite party may show by any legal evidence, that it is not his writing, or in other words, that the testimony by which it has been attempted to be established, is not correct. That the evidence offered here was legal, we have not the smallest doubt.

Both parties have complained of the judgment of the inferior court. The plaintiffs insist that it should have been in their favor for 52,280

dollars, 99 cents, instead of 25,283 dollars, 75 cents, with interest, on the balance of the real estate. The defendant contends that the amount due by him at the utmost, cannot be carried beyond 6,624 dollars. To detail at length the acts and reasons on which the parties have arrived at conclusions so widely different, is unnecessary. It would be impossible to render it intelligible to the minds of others, without extending in this opinion the whole evidence, which is voluminous, beyond any example that has yet occurred in this court. We have examined it with all the attention in our power, and we are unable to say that the evidence authorises us to come to a different conclusion from that of the district judge.

There are, however, some objections made by the defendant, John Gravier, which it would not be proper to pass over without stating the reasons which have prevented us from sustaining them. The principal one is to the refusal of the district court to allow him a credit for a note of his brother Bertrand, dated in the year 1796, for 15,000 dollars, 62½ cents, payable six years after date, and which note he avers, is supported by an account current, signed by the parties on the same day that the note was executed.

The district judge was of opinion these documents, together with some others introduced by the defendant, were false. How gratified we should have been had the evidence permitted us to come to a different conclusion, we need not state. But it has not allowed us to do so; and painful as it is to express an opinion, which implies such a total want of moral principle in one of our citizens, justice requires it, and our first duty is to satisfy her demands.

The defendant introduced a witness in the court below, J. P. Guinaut, who declared that he believed the signature of B. Gravier to the note and account current, was genuine. This fact does not appear to have been much controverted. Indeed it is the very existence of that signature, and the appearance it has, compared to that which was written above it, that furnishes one of the strongest reasons against the obligation presented.

Five witnesses, examined in the court below, positively swear, that they were of opinion the handwriting of the body of the note was of a much more recent date, than that which it purports to bear. Three of them thought it could not be more than two years old, if so much. One of them thought it might have been written three or four years ago. The fifth stated, the filling up of the note was in the hand writing of John Gravier, according to the best of his opinion, founded on having seen the said John Gravier often write.

With the opinion of these witnesses this court entirely concurs. The note and account current, both bear, in our opinion, the most satisfactory evidence of having been quite recently made. The signature of B. Gravier to each are ancient, but what is written above them is fresh. How these signatures were obtained, we need not inquire. The counsel for the plaintiffs has suggested several ways in which it is probable they were got. We need not say which we

adopt. For no matter how they were got, unless we reject the evidence of our senses, when the documents are presented for inspection it is impossible to resist the conviction which forces itself on the mind on examining them.

There is another circumstance which has not been without its weight. Different documents have been presented by the defendant, in which alterations to his advantage, and the injury of his co-heirs, have been made. They are so clumsy, and so apparent, that the counsel has not attempted to deny them. No satisfactory reason has been given for their production. In one of them, the alteration has been made to correspond with an item in the account current. And when this alteration is brought close to that account, and compared with it; they appear to have been both done with the same ink and the same pen.

The defendant contended there was error in the judge below not allowing him the increased value of certain property adjudged to him as part of the estate, and from which property he was afterwards evicted by a judgment of the late Superior Court. We think there was no error in this. John Gravier was the person who acted for the succession, and at whose instance its property was sold. Every thing in relation to it was caused by his intervention. The lots were expressly adjudged to him as litigious property.

We see, therefore, neither a legal, nor equitable right, in him to be paid the increased value at the time of eviction.

On the whole, we are not able to discover, that any errors in law have been committed by the district judge. Nor can we find sufficient evidence to justify us in reversing his judgment on the questions of fact at issue.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Young, for the plaintiff.

Derbigny, for the defendant.

Abat *v.* Casteres. III, N. S. 220.

Same *v.* Vallet.

Action of redhibition does not take place in sales made by authority of justice.

The purchaser at sheriff's sale cannot refuse payment on the ground that he has bought without title; he must *be evicted.*

The power to imprison a purchaser at sheriff's sale, until he comply with the contract, is not unconstitutional.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The defendant having become the purchaser and received possession of property at a sheriff's sale, refused to carry the contract into effect on an allegation that the slave adjudged to him, was not the property of the person in whose name she was sold, and also that she was afflicted with redhibitory defects.

The plaintiff applied to the parish court for a rule on the defendant to show cause why he should not be imprisoned, after refusing to perform his contract.

In opposition to this demand, the defendant introduced evidence to establish the truth of the allegations, on which he had refused to comply with his purchase, and the court being of opinion that the facts proved by him constituted a legal defence, discharged the rule. The plaintiff appealed.

We dismiss from our consideration every thing in relation to the redhibitory defects, as our law contains an express provision that the action of redhibition cannot be brought in relation to property, purchased at a sale made by authority of justice.

The only question, which requires some examination, is that by which the defendant alleges want of title in the person, as the property of whom the slave was sold.

By the act of 1817, in relation to judicial proceedings, it is provided "that when eviction shall take place, for want of title in the debtor, the purchaser, at sheriff's sale, shall have an action against both the debtor and creditor for his purchase money, but he may be first compelled to discuss the property of his debtor." This provision introduced an entirely new regulation on the matter in which it treats. By the ancient laws of this country, the purchaser at sheriff's sale who was evicted of the thing sold, could have recourse only against the debtor. He had no action against the creditor, unless the latter

bound himself to warranty, or knowing that the thing belonged to another, pointed it out, and required it should be sold. The evidence taken in this case does not bring the plaintiff within any of these exceptions, and the defendant's rights must of course be ascertained by the act of the legislature already cited. That act, as we have seen, limits the responsibility of the creditor to the case of eviction, and that not being shown here, the defendant has not justified his pretension to refuse payment for the property purchased by him. Acts of the Legislature, 1817, 40, *sect.* 20; *Partida*, 5, 13, 50; *Cur. Phil. p.* 2, *verbo Remate, no.* 17; *Febrero, p.* 2, *lib.* 3, *cap.* 2, *sect.* 5, *no.* 351.

The defendant has urged, that the provision of the Spanish law which authorises the plaintiff in execution, to have the person of the purchaser at sheriff's sale, arrested and imprisoned, in case he fails to comply with the contract of adjudication, is repealed by the genius and spirit of the free institutions under which we are now happily placed. The court is unable to see the subject in this point of view. The remedy is certainly a harsh and severe one, but there is nothing unconstitutional in it. The policy of imprisoning debtors has been much questioned, but we are not aware that the authority of the legislature to enforce obligations by this remedy has been called in doubt. In point of severity the regulation here attacked is not perhaps worse than the right given to the creditor to arrest the debtor, in the incipient state of the suit, and imprison him until he give bail.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that John Vallet be arrested and committed to prison, until he pay the sum of 303 dollars, the amount of the price of a slave, purchased by him on an execution which issued at the suit of Antoine Abat *v.* B. Casteres; and it is also adjudged and decreed that the said John Vallet pay the costs of this appeal, and those of the proceedings had in the court of the first instance.

Seghers, for the plaintiff.

Canonge, for the defendant.

Cornell and Wife *v.* Hope Insurance Company.
III, N. S. 223.

Conditions precedent are known to our law.

A denial that the plaintiff performed one part of his contract is not an admission that he performed the rest, if this denial follows the general issue.

The neglect of one party to prove what is essential to his recovery, is not cured by the evidence of the other leaving the fact doubtful.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petitioners state that they insured with the defendants a house and buildings thereto belonging, and a certain quantity of groceries; that the same has been totally consumed by fire; and that the defendants have refused to pay them 2500 dollars, the amount of the loss sustained.

To this petition, and to the manner in which it was commenced, it having originated by attachment, various objections have been made, and several means of defence presented. We deem it unnecessary to set out any, but that on which our opinion has been formed, and which is decisive of the cause.

The policy of insurance is made a part of the petition, and in it we find a clause which states that the policy is made and accepted in reference to the proposals and conditions thereto annexed, which are to be used and resorted to, in order to explain the right of the parties.

On referring to these conditions, we find the 9th one to be, that all persons insured by the company, and sustaining loss or damage by fire, are forthwith to give notice to the company, and as soon after as possible, deliver in a particular account of such loss or damage, signed with their own hands, and witnessed by their oath or affirmation; and also, if required, by their books of accounts and other papers and vouchers. They shall also declare on oath whether any and what other insurance has been made on the same property; and procure a certificate under the hand of a magistrate, notary public or clergyman, (most contiguous to the place at the time, and not concerned in the loss,) that they are acquainted with the character and circumstances of the person or persons insured; and that having investigated the circumstances of the person or persons insured, in relation to such loss, do know, or verily believe, that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire, loss and damage to the amount therein

[Cornell and Wife v. Hope Insurance Company.]

mentioned: and until such porofs, declarations and certificates are produced the loss shall not be payable.

The defendants contend, that this clause operates as a condition precedent to the right of the plaintiffs to recover. And they have shown, by the decisions of the courts of justice of the country, in which this clause was originally introduced into policies of insurance and from which it was most probably taken, and incorporated into similar instruments in ours, that it is uniformly so considered. Nay, so rigidly has the insured been held to a compliance with this condition, that in cases where he proved he had made every effort to comply with it, and that his failure arose, not from a suspicion of fraud, on the part of those whose certificates he was to furnish, but from their want of knowledge of the circumstances under which the fire took place, it was considered he could not recover from the insurers. That the parties had made their agreement in this way, and must be bound by it. 2 Marshall, 808; 2 Henry Blackstone, 577; 1 *Ibid.* 254; 6 Durnford & East, 710.

To this the plaintiff has replied,

1. That the doctrine of precedent conditions in the common law is unknown to ours.

2. That he was not put on the proof of this fact by the pleadings.

3. That the jury have found a compliance with this condition.

I. There is not the slightest foundation for the argument, that conditions precedent are unknown to our law. They are recognised and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional, when it depends on a future or uncertain event, says our Code. The event then must be shown, to make the obligation binding on the party against whom it is presented. For until it takes place, he is not bound to perform what he has promised. Civil Code, 272, art. 68.

There is an exception to this rule in regard to the dissolving condition. But in relation to all others, it is true, and it is a matter of no moment whether we say the obligation is suspended until the condition is performed, or that the performance of the condition must precede the execution of the obligation. Civil Code, 274, art. 81 and 3; *Toullier, Droit Civil Français, liv.* 3, *tit.* 3, *chap.* 4, *no.* 472; *Pothier, Traité des Ob. no.* 202.

II. The plaintiff was put on the proof of the condition being performed. The answer states, that the petitioner has not complied with the conditions of insurance, and particularly the 10th. Their reliance on the failure in relation to this article, cannot be construed into an admission the others were performed, particularly when the special averment follows close on the general denial.

III. The jury found, on a fact submitted by the defendants, "that the plaintiff had not complied with all the conditions of insurance, as contained in the articles annexed to the policy of insurance." The plaintiff insists that this establishes he has complied with all the con-

ditions necessary for him to perform. How such a conclusion is inferred we have been unable to discover. We have already seen that it was the duty of the plaintiff to aver and prove a compliance with the condition on which his right to maintain his action depended. To avert the consequences of his failure to do either, he relies on a fact submitted by the defendant, which leaves it doubtful whether this condition was performed. But this he cannot be permitted to do. The neglect of one party to prove what is essential to his recovery, is not cured by the evidence of the other leaving the fact doubtful.

On the whole, we are satisfied the judge of the first instance did not err in directing a nonsuit.

It is, therefore, ordered, adjudged and decreed, that this judgment be affirmed, with costs.

Hennen, for the plaintiff.

Morse and *Maybin*, for the defendants.

Miller *et al. v.* Mercier *et al.* III, N. S. 229.

When the principal debtor has failed, it is not necessary to obtain judgment against him, in order to pursue mortgaged property in the hands of a third possessor.

Where the lien results from an act done, and not from a contract reduced to writing, it need not be recorded.

A decision on any point connected with the merits, authorises an examination of the whole case in the Supreme Court.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petitioners state that the defendants are indebted to them in the sum of 400 dollars, for timber and other materials furnished and delivered to them for building and constructing a cotton press, during the months of May, August, September, October and November, 1821, and they pray they may have payment for this sum; that the debt may be deemed to be privileged; and that the press for which the materials were furnished be sold to satisfy the judgment.

The defendants plead:

1. That the materials, if ever furnished, were sold to Jacob Hart, the former owner of the press.

2. That the plaintiffs cannot seize and sell the property in their hands, until judgment is obtained against the principal debtor.

3. That the privilege is extinguished by prescription.

4. That all the averments in the petition are untrue, and that the sum therein claimed has been paid by Hart.

The evidence taken in the cause as to whom the materials were sold, and as to the time of delivery, is very unsatisfactory, and leaves it quite uncertain whether they were purchased by Hart, or the defendants. As the burthen of proof as to this fact lay on the plaintiffs, and they have failed to establish it, we must consider the property sold to the vendor of defendants, and proceed to examine whether the petitioners have made out their right to seize and sell it in the hands of the third possessors.

Before doing so we must notice an objection of the plaintiffs, that the plea of payment must be taken as an admission of the other facts alleged in the petition. This position does not appear to the court well founded. It is true we have decided that parties cannot plead inconsistently; and that when the debt was denied, and there was joined to this denial, an avowal that it was paid, we would disregard the former. But the allegation that Hart purchased the property, and made payment, may well stand with the denial, that the defendants did not buy it.

It is objected that the plaintiffs cannot seize and sell the property in the hands of the third possessor, without obtaining judgment against the principal debtor. The general rule is as contended for; it is expressly established by the Code; and the court has more than once recognised and acted on it. The petitioners, however, contend this case necessarily presents an exception to the rule, because the debtor has become insolvent.

In the case of Bernard *v.* Vignaud, where the doctrine in relation to actions on mortgages came under the consideration of the court, it was said that when tacit liens were sought to be enforced, one of the provisions of the Code must necessarily be dispensed with; namely, that which requires the mortgagee to produce the act of mortgage together with a judgment; because, these liens resulting from the provisions of the law, it was impossible that any act of this kind could be produced. In that case the court was compelled either to say that privileges of that kind could not be enforced at all on the property, in the hands of third persons, or to dispense with that rule, which requires the production of a written instrument to establish it. The provisions of the Code were equally clear on both points, that all mortgages should be enforced on the property found with the third possessor; and that in all cases when that was attempted, the act of mortgage should be produced. Finding it impossible to give effect to both, we held that tacit liens formed an exception to the general rule.

It is believed by the court that the case now under consideration cannot, on principle, be distinguished from that just alluded to.

There can be no doubt but the plaintiff has a lien on this property. The defendants, however, say that it cannot be enforced until judgment is previously obtained against the principal debtor. To this the plaintiff replies, that the purchaser has become insolvent, and that the law will not permit judgment to be obtained against him in the ordinary way. That all that could be done, has been done in the present instance. Namely, to have the debt recognised at a meeting of the creditors; which recognition makes a part of the *juicio de concurso*, and is the only species of judgment that the law contemplates against persons standing in the situation of the original debtor. In this reasoning we concur, and think that the case, as necessarily offers an exception to the general rule of producing a judgment, as the tacit lien does to presenting an act of mortgage, and this opinion is in conformity with the declaration of the court on this subject, several years since, in the case of Mouchon *v.* Delor, 5 *Martin*, 401. *Curia Phillip. lib.* 2, *cap.* 3, *no.* 33; *Febrero*, *p.* 2, *lib.* 3, *cap.* 3, *no.* 102.

There remain, however, two objections of the appellees to notice.

The first is, that the lien has not been recorded, in pursuance of the provisions of the act of 1813.

On this point, we refer to the construction put on this statute, in the case of Lafon *v.* Sadler, a construction that we have since had more than one occasion to reconsider, and to which we have uniformly felt it our duty to adhere. It was there held, that tacit liens, resulting from acts done, and not from contracts reduced to writing, were not embraced by the provision of the law, because, among other reasons, it was impossible such acts could be recorded. The legislature, by the statute passed in 1817, adopted the principle, and provided, that "all architects, undertakers, and other workmen," should make their contracts in writing, in order that they should be recorded.

The lien claimed here is not enumerated among those which it was deemed necessary to thus provide for. Whether the silence, as to these privileges, proceeded from omission, or from a conviction that, not being of so frequent occurrence, there was not the same reason of guarding against them, it is not important for us to inquire. Our duty is confined to acting on the law, as it is given to us. 4 *Martin*, 479; 11 *Ibid.* 280 and 237.

We have been pressed to remand the case for a new trial, because the court below, after hearing all the testimony offered, decided that the defendant, if liable at all, could not be sued until judgment was had against the principal debtor; and in support of this demand we have been referred to a late decision of this tribunal, where it was held that if the judge *a quo* decided that he had not jurisdiction to inquire into the merits, we could not go into them on the appeal: because that appeal was in fact taken from his refusing to investigate the case on its merits, not from any error he committed after investigation. It appears to us this is a very different case. There was an examination of the case here on its merits, and it has been the

uniform practice of the court, that when this takes place, no matter on what point the case is decided; whether on any of the exceptions which makes a part of the defence, or by a final judgment in favor of either party, such decision brings the whole case before us; we cannot distinguish between this plea and that of *res judicata*, simulation, payment, prescription, transaction. See *Febrero, p.* 2, *lib.* 3, *cap.* 1, *sect.* 4, *nos.* 208 and 209; *Curia Phillip. p.* 1, *Citation, nos.* 4 and 5.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that on failure of the defendant to pay the plaintiffs the sum of 400 dollars, with interest from the judicial demand and costs of suit, in ten days from the notice of the judgment, the mortgaged premises mentioned in the petition be seized and sold to satisfy the said sum of 400 dollars, with interest and costs, as affirmed.

Lockett, for the plaintiffs.

Derbigny, for the defendants.

Miller *et al. v.* Mercier *et al.* III, N. S. 236.

The re-enacting in the Civil Code the general provisions in the ancient laws of the country, does not repeal the exceptions with which the general rule was limited.

FIRST District.

Porter, J., delivered the opinion of the court.

This is an action against a third possessor of property, on which the plaintiffs aver they have a lien, or privilege. The defendants insist that the plaintiffs cannot recover until they show a judgment against their principal debtor. They also plead prescription, and other pleas. This case has been already heard, and an opinion was given by this court at last May term. A rehearing was granted, and the parties have been again heard, on the points on which the defendants required a re-examination.

The principal ground, on which a change of the former judgment of the court has been insisted on is, that no judgment has been shown against the principal debtor, and that the debt has not been established. To this the plaintiffs reply, that it is impossible for them to procure a

judgment against their debtor, because he has become insolvent: and that the existence of the debt is shown by their being placed on the bilan of the bankrupt; and by an admission of the defendants on record, that the items mentioned in the account were furnished by the plaintiffs to Hart, the insolvent debtor, that they were incorporated in the cotton press, of which the defendants have become the purchasers.

We have held, in a variety of cases, that the re-enacting in the Civil Code, of the general provisions, found in the ancient laws of this country, did not repeal the exceptions with which the general rule was limited; and in the opinion lately delivered in the case of Herman *v.* Sprigg, *ante*, 50, we have again gone into the reasons on which that rule has been established in this court. An application of this doctrine has been made to the subject now under consideration, in the case of Nathan *et al. v.* Lee, 2 *N. S.* 32. And we are unable to distinguish on principle, that case from this—for there is the same exception in the Spanish law to the necessity of a judgment in case of insolvency, that there is where the deed of mortgage contains the pact of *non alienando. Cur. Phil. p.* 2. *Tercero poseedor, no.* 13.

The existence of the debt, it appears to us, is sufficiently established by the declaration of the debtor, in his bilan, taken with the confession of the defendants on record.

We have been pressed to remand the cause, because the decision of the judge, dismissing the case for want of the plaintiffs showing a judgment against the principal debtor, prevented the defendant from introducing evidence to show that the claim sued on was unfounded. So far as the record gives information on that point, and to it alone must we look when the parties do not agree in their statements, the judgment appears to have been rendered after the evidence was gone through. We therefore are unable to discover any legal ground on which we can remand the cause.

The former judgment of the court does not require any alteration.

Lockett, for the plaintiffs.

Derbigny, for the defendants.

Dreux *v.* Dreux's Syndics. III, N. S. 239.

FIRST District.

The estate of a husband is tacitly mortgaged to secure the right and claim of a wife for her paraphernal effects disposed of by him: she is entitled to preference over creditors merely chirographic. In the present case she held no instrument which could be recorded: her mortgage was exclusively tacit.

Frisby *v.* Sheridan. III, N. S. 242.

FIRST District.

In this case the defendant, master of a boat, negligently suffered a box of drugs entrusted to him to be landed on the way, and had it not ready to be delivered on the arrival of the boat at the place of delivery. The plaintiff had a right to procure other drugs, and bring his action *instanter:* he was not bound to wait.

Arnold *v.* Dean. III, N. S. 248.

FIRST District.

Held, that ten per cent. claimed by defendant is an unreasonable charge for commission on sales. The testimony shows the charge in New Orleans to be five per cent.

The judgment was affirmed with ten per cent. damages for the delay occasioned by this appeal.

Preston, applied for a rehearing, whereupon,

PORTER, J., delivered the opinion of the court.

It having appeared to the court that the appeal in this case was taken merely for delay, the judgment of the inferior tribunal was confirmed with ten per cent. damages. This decision was made on deliberate conviction, as to the true construction of the statute, and in conformity with the repeated decisions of this court, from its first organisation, up to the moment of rendering this decree.

The attorney-general, on behalf of the defendant, has moved for a rehearing, and the principal grounds for the application are: First, that the court has given damages for a frivolous appeal, which is not one of the cases contemplated by the statute. Secondly, that the causes in which damages should be accorded, are those where there is great doubt and difficulty, and the appellee is put to trouble and expense to establish his claim. And lastly, that this tribunal is supported at a great expense by the public.

We have given to all these reasons our most serious attention, and we have thrown out of view the weight, which the argument on the other side derives from the continued practice in this tribunal, for if we have been travelling a wrong road, the sooner we retrace our steps the better. The words, used in the statute under which this power has been exercised, are, "the Supreme Court when they shall affirm a judgment, may adjudge to the respondent such damages and interest as they shall think a sufficient compensation for the loss and prejudice he may have suffered in consequence of the appeal." No particular class of cases are here designated. It has been left to the court to give the law an application to any case in which it was conceived the respondent suffered loss and prejudice. The only cases to which it has yet been applied, are those where it was manifest the appellant did not bring up the cause to have errors in the judgment corrected, but merely to delay its execution. Such appeals must necessarily be a loss and prejudice to the appellee, because they prevent his obtaining that, to which the justice of his country has said he is entitled. They are without justification on the part of the appellant, and are therefore proper cases (at least so we have thought) for affording compensation in damages. Whether it is said in pronouncing the judgment of the court, that these damages are given to the appellee because he has been improperly brought here; or granted because he has suffered loss and prejudice by the appeal, is in our view the same thing, for the one is a necessary consequence of the other. Nor can we perceive it makes any difference, whether it is said the appellant shall pay because he has inflicted an injury; or that the appellee shall recover, because he has sustained one. We are therefore satisfied that a rehearing should not be granted, because the expressions used

in our former judgment, declare, that damages are given for the frivolous appeal.

And still less do we deem it necessary to re-examine the cause, on the ground, that damages should only be given, where appeals are taken on difficult and doubtful matters. It may be true that there are cases, where, even on a strong contest as to the law and the facts, the judgment would be confirmed with damages for bringing the cause before the appellate court. Though it is not exactly seen by us what good reason could be assigned for it, or how the exercise of a legal and constitutional right to call for our judgment, could be considered as a loss and prejudice to the appellee. But admitting there might be such cases, we are most clear they are not the only ones, and that the appellee may suffer loss and prejudice, when the appellant appeals without cause, as well as when he has good reason for doing so.

But in this case we are told, it was impossible the plaintiff could have been at loss and prejudice by the appeal, because the matter in dispute was only 20 dollars; that it was so plain the judge could have seen on opening the record there was not the slightest ground for doubting the correctness of the judgment of the court below; and that therefore the appellee had no occasion to employ counsel, or to put himself to either expense or trouble.

If the judgment was so clearly correct, as to have been apparent on the first inspection, then the defendant appealed for no other purpose but to delay and defeat justice. In doing so he injured the plaintiff, and he ought to pay damages for it. And it does appear to us, to the last degree, strange, that the defendant should urge the total want of any ground for appeal, as the reason why he was authorised to take it, and force the plaintiff to follow him here to have the judgment confirmed.

As to this court being a great expense to the public, we do not see in that remark any reasons for granting a rehearing between these parties.

Morse and *Maybin*, for the plaintiff.

Preston, for the defendant.

Turner *v.* Hickey. III, N. S. 256.

THIRD District.

Held, that if a bill of exchange be given in payment of a precedent debt, the drawer is responsible if it return dishonored.

Butler *v.* Kenner *et al.* III, N. S. 257.

FIRST District.
Judgment confirmed with damages on an appeal for delay.

Lemos *v.* Duralde. III, N. S. 258.

FIRST District.

Petitioner being the maker of a note which bore mortgage, and having paid it, took it to the recorder of mortgages and required him to raise the mortgage. The latter refused, saying that he did not know the signatures of the persons on the note, and he did not think the act authorised the recorder to cancel the mortgage. Plaintiff relied on the Civil Code, 466, art. 64, act of 1817, 61, sect. 3. Defendant relied on the custom which prevails, that the person who wished to raise a mortgage must do so by an authentic act before a notary, and on the production of this act that the recorder should cancel the mortgage: this, for the ascertaining of the identity of all persons appearing before them. The court waived the decision whether under the act of 1817, the bearer of a note, such as that alluded to in the statute, has not a right to compel the erasure of the mortgage on exhibiting it. *Decided*, that when the debtor presents himself in order to have a lien taken off his property, he should show the consent of those in whom the lien was vested, and that by as high evidence as that by which the lien was created.

Bainbridge *v.* Clay. III, N. S. 262.

FIRST District.

The proceedings of a debtor against his creditors is *res inter alios acta*, as to one who is not on the bilan, and of which claim no mention is made. *Febrero, p.* 2, *b.* 3, *c.* 3, *no.* 14, and *no.* 21.

Robertson *v.* Nott. III, N. S. 268.

FIRST District.

The presumption which arises from a bill being drawn in the usual form, that it was intended it might be negotiated, yields to testimony of the contrary.

Durnford *v.* Ayme. . III, N. S. 270.

The pleas of usury, fraud, and want of consideration, do not waive the general issue.
An act of the legislature cannot affect instruments executed before its passage.

FIRST District.

MARTIN, J., delivered the opinion of the court.

This case is before us on two bills of exceptions.

The first is to the opinion of the judge *a quo*, allowing leave to the defendant to strike out the pleas of usury, fraud, and want of consideration.

[Durnford v. Ayme.]

The general issue was pleaded, and it is urged that the court, by allowing the pleas to be stricken out, erroneously deprived the plaintiff of the acquired right in the admission, resulting from these pleas, of the fact incumbent on him to prove, on the general issue.

The second bill is to the opinion of the judge, on refusing the testimony of the maker, to establish the signature of the endorser and payee.

It is urged, that by a late act of the general assembly, the maker of the note is, in a case like this, expressly declared inadmissible; and that even before the act he could not be heard—having an interest to charge the payee; against whom he may avail himself of any equitable circumstance, which he could not oppose to an endorsee, and the great bias he is under to support the note, which in this case is one of accommodation, and to prevent the suspicion of forgery which would attach on him, if the signature be not what it purports to be.

1. The pleas of usury, fraud, and want of consideration, are not in this case a waiver of the general issue, for neither is inconsistent with it. Those pleas are erroneously assimilated to that of payment. Payment is the extinguishment of a debt, and he who avers that he paid, extinguished a debt, impliedly admits it had an existence, for that alone renders it capable of being extinguished.

It is true, these pleas of usury, fraud, and want of consideration, are useless and of no avail, if the debt be not proved. In this they resemble the plea of payment. But they do not, like it, exclude the idea that the debt did not exist. Far from it, they aver it did not ripen into a demand.

From the imperfection of human judgment, the idea of the possibility of a fact, which never happened, being legally established, cannot be rejected. Witnesses may err, may prevaricate. A note may have been written over my signature, carelessly put at too great a distance from the writing I was desirous of attesting; and it may possibly be out of my power to prove the fraud; yet this ought not to prevent one from pleading the general issue. And if I have a claim against the plaintiff, I ought to be allowed to provide the means of availing myself of it, if I fail in the general issue; which would be waived by an absolute plea of payment.

In the present case the usury, fraud, and want of consideration, attach on the endorsement the act by which the plaintiff acquired a title to the contents of the note. The defendant may well say he did not endorse the note, and show the maker was imposed on by fraud, that an advantage was taken of her necessities, by obtaining the note through usury, and without a serious consideration.

We think the leave was properly granted.

2. The act of assembly invoked, being posterior to the endorsement of the note, should not take away the right to the testimony which the plaintiff had previously acquired. The legislature could

not destroy the debt; consequently they could not take away the means of proving it.

It does not appear to us that the maker of a note was before the act an inadmissible witness against the payee and endorser.

It is not an objection to a witness, that he is a party to the note sued on, unless he be interested in the event of the suit, or the verdict sought to be obtained with the aid of his testimony, may be in evidence in his favor in another suit.

If the interest of a witness inclines him as much to one side as the other, so as upon the whole, to make him indifferent, in point of substantial interest, whether the verdict be for the plaintiff or defendant, he is a competent witness for either.

Here the witness was, it is true, a party to the note, but the verdict to be given would be as to her *res inter alios acta;* and could not be evidence for or against her. She had no substantial interest in the event of the suit. The plaintiff, it is true, in case he failed against the endorser, might sue her; so he might, even if he succeeded, unless he actually obtained payment. If the defendant failed, she was liable to his action after the plaintiff was paid. The suit found her suable at its inception, and left her so at its conclusion. The satisfaction of the judgment obtained by the plaintiff, had the effect, it is true, of changing her responsibility.

In case she had an equitable defence, to oppose to the payee, which she could not to the endorsee, she placed herself *in duriori casu* by supporting the defence, and she had therefore an interest to support the claim. This may be true, but courts must act on cases as they are, not as they may possibly be. The circumstance of the witness having such an equitable defence, if it may work an exception to the general rule, ought to be alleged and shown. The party in such a case must establish the facts on which it may rest by the *voir dire* of the witness or other proof.

It is also true, if the plaintiff succeeds, the witness will be liable to the present defendant for the amonnt of the note, and the costs and damages, which may result from his neglect to take up his accommodation note. Of the bias which this sort of interest may create, the plaintiff might complain, but the defendant cannot, for to him it will be favorable.

The interest which repels a witness must be a substantial one, *i. e.*, a pecuniary one, affecting in some manner his property; it does not suffice that it affects his feelings, his affections, or his wishes.

Husband and wife are excluded, because they have a great identity of interest. Ascendants and descendants for the same reason, being forced heirs. The common law of England, to which forced heirship is unknown, admits the parent to testify for the child, and *vice versa.* The factor or agent testifies for his principal in matters intrusted to him. A party charged with the forgery of the note, sued on, and actually imprisoned in consequence of the charge, has been admitted. Phillips' Evidence.

[Durnford v. Ayme.]

We think the judge *a quo* erred in rejecting the witness. Her deposition came up with the record, and had not one of the parties demanded a jury trial, we might have examined the case on the merits. This circumstance prevents it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded, with directions to the judge *a quo*, not to reject the testimony of the maker of the note; and it is ordered that the defendant and appellee pay costs in this court.

Hennen and *White*, for the plaintiff.

Mazureau, for the defendant.

Clay *v.* Oldham. III, N. S. 276.

FIRST District.

If part of the plaintiff's answer to interrogatories be stricken out, the defendant is not entitled to further time to except to what remains.

If a party be called on by an interrogatory to state whether he have a paper in his possession, and he answer in the affirmative, it is sufficient if he produce it on the trial, and the opposite party is not entitled to a continuance to examine it.

If the proceedings have been changed from the *juicio executivo* to the *juicio ordinario*, judgment may be given generally against the defendant. *Febrero, p. 2, l. 3, c. 2, sect. 2, no.* 115; *Curia Phil., p. 2, juicio executivo, no.* 1.

Miller *v.* Pierce. III, N. S. 284.

FIRST District.

Though the judge *a quo* may have charged erroneously, yet if justice be done, judgment will not be disturbed.

Boyd *et al.* v. Howard. III, N. S. 286.

FIRST District.

The petition claimed the price of a number of barrels of flour, at a sum certain: though there was no claim for a *quantum valebant*, he may yet prove the value and recover it.

Millaudon v. Soubercase. III, N. S. 287.

The action of *quanti minoris* must be brought within one year.

FIRST District.

PORTER, J., delivered the opinion of the court.

The plaintiff claims from the defendant a sum of money which he states the defendant owes him in consequence of selling a quantity of cotton, as merchantable and of first quality, when the same was fraudulently packed, and no part of it equal to the description, except the outside of the bales.

The defendant denies the fact, avers that he acted only as agent in the sale of the cotton, and pleads prescription.

The evidence shows clearly that the plaintiff has sustained an injury; the only question is whether he has commenced his action in sufficient time to recover.

The sale was made in New Orleans, on the 22d of February, 1818, the action was commenced on the 23d of June, 1821.

On behalf of the defendant, it was urged that this is nothing more than an action *quanti minoris*, to wit, one for the reduction of the price, in consequence of a defect in the thing sold, and that such action must be commenced within twelve months from the date of the sale, or at least from the time within which the defect became known to the purchaser. *Curia Philip. lib.* 1, *cap.* 13, *nos.* 1 and 9; 11 *Martin*, 11.

On that of the plaintiff, it was urged, that this was not an action of *quanti minoris*, but one claiming damage for a fraud practised on him, and we are referred to the 6th law of the 16th title of the 7th Partida, by which it is provided that he who has been defrauded, may bring suit for reparation at any time within two years, but not after, unless he has sustained damage, and that if he has, he may claim amends of the wrong-doer at any time within thirty years.

It is not easy to reconcile the different provisions of the Spanish law in regard to these actions; for we find that the action of *quanti minoris* is given in cases where the seller knew the defects of the thing sold, as well as those wherein he was ignorant of them, and acting in good faith. *Curia Philip. lib. cap.* 13, *no.* 10; *Commercio Terrester, Par.* 5, *tit.* 5, *ley* 65. Perhaps the true understanding of them is that the buyer has the choice of either action, in case the seller has acted fraudulently. On this point however, we express no opinion. For the petition does not charge the defendant with having fraudulently sold the cotton; it states that a certain quantity of that article was sold by him, which was fraudulently packed. Which assertion by no means implies that the defendant had knowledge of the fact. In almost every case where cotton is fraudulently baled at the gins, the seller in this place, if a merchant or broker, is innocent of any participation in the cheat committed. The evidence taken does not in any respect show the conduct of the defendant in a different light from that which the plaintiff has represented it in the petition. The knowledge of the defect in the interior of the bales is not brought home to him. The circumstances attending the sale, and the character in which he acted, exclude the presumption of fraud. The purchaser in Bordeaux might as well have accused the plaintiff of knowing in what manner the interior of the bales was filled.

Considering, therefore, the action to be one of *quanti minoris*, and that it was not brought within the time prescribed by law,

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that there be judgment for defendant as in case of nonsuit, with costs in both courts.

Banks *v.* Eastin. III, N. S. 291.

FIRST District.

If the note be regularly endorsed, the defendant cannot put the plaintiff on the proof of his right to it.

Unless there is an allegation that the plaintiff did not come to it *bona fide.*

An endorsement in blank, makes the note payable to bearer.

Allard *et al. v.* Lobau. III, N. S. 293.

FIRST District.

Every affidavit for a continuance, should contain a declaration that the evidence is material, that due diligence has been used to procure it: that there is an expectation it will be had, and that the application is not made for delay.

A judgment against a person who sues to abate a nuisance, does not form *res judicata* against another who brings a similar action.

The right conferred on the Navigation Company, to make a road along the banks of the bayou St. Jean, is not a surrender of the sovereignty of the public.

A squatter on public lands has no right to object to a road being run through his possessions.

Parol evidence cannot be given of the contents of a grant.

The right of the public to make roads, is not limited to the banks of navigable streams.

Possession cannot be pleaded against the public, unless it is immemorial.

Labarre *v.* Lambert. III, N. S. 300.

The plaintiff may, by the introduction of evidence by the defendant, obtain judgment, on a different ground from that prayed for in the petition.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The petition states Mrs. Lambert sold the plaintiff a negro, who soon after the sale went away, and was afterwards found in the possession of one Tyrrel, (in the state of Mississippi,) who claimed him under a title anterior to Mrs. Lambert's; whereupon the plaintiff brought suit against Tyrrel, and gave notice to his vendor that she might support her title. He concluded with a prayer that she might be decreed to pay back the price, with the costs of the suit, and that he might have further relief.

The answer denies that the disturbance complained of in the petition, gave rise to an action against her, the suit against Tyrrel, by the plaintiff, on showing, being still undetermined.

At the trial, the plaintiff introduced, without any opposition, the record of his suit against Tyrrel, which had in the meanwhile been determined; and in which Tyrrel had prevailed.

The district judge was of opinion that the plaintiff had no cause of action on the inception of the suit, Tyrrel having then no judgment, and the plaintiff's situation, in the present suit, was not bettered by the judgment afterwards obtained by Tyrrel. He accordingly nonsuited the plaintiff, who appealed.

The answer admits, because it does not deny, what the plaintiff alleged, viz. that Tyrrel detained the slave as his own property, and on the allegation of a title to him anterior to Mrs. Lambert's. The plaintiff has since shown, without any opposition, that in the suit he brought against Tyrrel and of which he gave notice to his vendor, that she might support her title, Tyrrel has prevailed, and the plaintiff lost his slave.

On the petition and answer, the case stood, *quasi* on a demurrer at common law, and the question was merely one of law, whether the plaintiff's action was not premature, the suit against Tyrrel being undetermined. The defendant suffered the issue to be changed, by allowing the introduction of the record of the suit against Tyrrel. It shows the latter prevailed. The consequence is that the plaintiff must have judgment on a different ground, from that he had claimed in the petition, *i. e.*, because he has been evicted on a suit of which he gave

due notice to the vendor, requiring her to come and support her title, which she neglected to do.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff recover from the defendant, Mrs. Lambert, 732 dollars, the price of the slave, with interest from the inception of the suit, and 24 dollars, being the cost of the suit against Tyrrel, and costs in both courts, and that the case be remanded for further proceedings against P. K. Wagner, the vendor of Mrs. Lambert, cited as warranty.

Seghers, for the plaintiff.

Canon, for the defendant.

Brent *v.* Erwin. III, N. S. 303.

If the note alleged to have been lost, is admitted to have been executed, and it was proved it was protested and afterwards returned to the plaintiff, so that an endorsee would acquire it subject to all the equity, that might be opposed to the plaintiff, he will not be compelled to give surety.

FOURTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff claims, as endorsee, payment of the defendant's note, which it is alleged was protested, at maturity, and afterwards purloined from the plaintiff's possession. He had judgment on the plea of the general issue, and the defendant appealed.

On the trial, the plaintiff offered in evidence his own affidavit of the manner in which the note was purloined or lost, his advertisements for the recovery of it, and evidence of his conversation with a person near him, at the time of this alleged purloining or loss. These documents were received notwithstanding the defendant's objections, and he took bills of exceptions.

As the case may well be disposed of, on the evidence which was received without opposition, we have thought it proper to reserve the consideration of the admissibility of the evidence objected to for a case in which the consideration may be necessary.

The written evidence not objected to consists of a copy of the note and protest and three letters of the defendant, who admitted his signatures thereto.

[Brent v. Erwin.]

The note copied on the back of the protest, is a copy of that which is annexed to the petition, and the protest states that the defendant, on the original being exhibited to him by the officer, on the day of payment, answered, he would not pay said note.

The defendant's letters, the first of which bears date a few weeks after the protest, contain offers to settle the plaintiff's demand for 3250 dollars, the exact amount of the note sued on, by giving other notes, or an acceptance at twelve months in New Orleans: and in the latter the defendant announces the approach of Robertson, his son in law, charged with the explanation of his intention to the defendant.

The parol evidence consists of the testimony of the officer who protested the note, who declares the copy of it and of the protest annexed to the petition is a true one, that he delivered the original to the plaintiff after the protest; that he knows the signatures of the defendant, at the foot of the note, and that of the payee and plaintiff's endorser on the bank.

The testimony of Robertson, the bearer of the last letter of the defendant to the plaintiff, shows that the proposition made to the latter, was to give him the acceptance of a mercantile house in New Orleans at twelve months, on his giving security, and the use of four negroes during one year.

We think the defendant, by suffering the above documents and testimony to be admitted, has relieved the plaintiff from the difficulty he would have been in, had any evidence, written or oral, of the contents of the note, been resisted, till its absence from the plaintiff's hands was accounted for. 1 *N. S.* 446; 5 *Martin*, 442.

It is not alleged that the note, or any part of it, was paid.

The only points at issue, are whether the defendant made the note sued on, and whether it was endorsed to the plaintiff by the payee.

We think the production of the protest and copy, and the testimony of the officer who made the protest, establish these two facts.

He swears he knows the signatures at the foot and back of the note; and we conclude that this is evidence not only of his knowledge or acquaintance with the handwriting, but also of his belief of its genuineness.

The defendant's own letters strongly corroborate the evidence resulting from these documents and testimony. He admits he owes the plaintiff the exact amount of the note, and offers to settle the same, if time and security are given, with the douceur of one year's labor of four negroes.

Security is required; for what? The answer which the facts of the case suggest is, against the chance of the note being produced by a finder, or one to whom it might have been transferred.

A douceur; for what? As a compensation for relieving the plaintiff from the difficulty in which the absence of the note from his hands placed him. These are the answers which the facts, as explained, naturally furnish.

It appears that the note was returned by the officer to the plaintiff,

after the protest; it is clear that any person obtaining it afterwards received or found it burthened with the obligation of allowing any equitable plea, which might be opposed to it, in the hands of the present plaintiff; the district court did not err in refraining from requiring him to give security for the defendant's indemnification.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiff.

Grymes, for the defendant.

Chalmers *et al.* v. Stow. III, N. S. 307.

FIRST District.

In the first district, an application for leave to amend, is too late on the day the causes are set down for trial.

Talesmen may be summoned, without first exhausting all legal means to compel the attendance of jurymen on the panel. 2 *Martin's Digest*, 142, 182, and 192.

Nichol v. De Ende. III, N. S. 310.

FIRST District.

The sheriff may, at any time, be allowed to perfect his return, by signing it.

The endorsee of a note, secured by a mortgage, may, after he has paid it, have an order of seizure and sale; but he must prove the facts that entitle him to do so, by evidence of as high a nature, as the deed of mortgage.

EASTERN DISTRICT, FEBRUARY TERM, 1825.

Debuys *v.* Molleré. III, N. S. 318.

SECOND District.

Parol evidence is admissible to prove the promise of an endorser, subsequent to protest, to pay.

Schlater *v.* Broaddus. III, N. S. 321.

FIRST District.

The defendants may offer evidence to show that no property belonging to them was attached. It is not for the owner alone to plead this. See Woodward *et al. v.* Braynard *et al.*, 6 *Martin*, 573.

Lincoln *et al. v.* Visoso. III, N. S. 325.

FIRST District.

This was a question of fact.

Decided, if the vendor, after the sale, promises to send the thing on board of a vessel, and through the neglect of the pers n he employs, it be lost, the vendee may refuse the payment of the price.

Richards *v.* Nolan *et al.** III, N. S. 336.

THIRD District.

Decided, a receipt acknowledging *payment* for a lot is evidence of a sale. *Toullier, Droit Civil Français, no.* 8, *cap.* 6, *sect.* 1 and 2, *nos.* 321 and 327.

The evidence establishes that both vendor and vendee continued to reside on the premises after the sale. In such a case possession follows title. Consequently the defendants could not seize and sell the property as that of the vendor. If they, or either of them had a previous lien, they should have proceeded against the plaintiff who stood in relation to them as a third possessor, by the action of mortgage. If the sale to the plaintiff was fraudulent, suit should have been brought to set it aside. They could not treat it as a nullity, and sell the property as if no alienation had taken place. Civil Code, 460, art. 40, 41, 42, 43; *Curia Phil. lib.* 2, *verbo Revocatoria, nos.* 1 and 2; 9 *Martin*, 649; *Ibid.* 535.

* This case was now heard *ex parte*, and when the point was afterwards raised, a different doctrine was laid down upon argument. See Peet *v.* Morgan, 6 *Martin, N. S.* 142.

Lacroix *v.* Menard. III, N. S. 339.

FIRST District.

An intervening party may demand to have his case tried by a jury. 9 *Martin*, 381.

Louisiana State Bank *v.* Flood. III, N. S. 341.

FIRST District.

Whether the distinction of *public* and *private* acts of the legislature, be known in this state?

If it be, the act, incorporating the state bank, is a public one.

A party sued by the state bank cannot plead that the directors have neglected to take the oath required by law, under the plea that the election had not been legally *holden*.

Canonge *v.* Louisiana State Bank. III, N. S. 344.

FIRST District.

The bank cannot contest the right of the person who lodged a note with them, to it.

The bank may be sued for neglect, in protesting the note and giving notice, before the holder proceeds against his endorser.

The record of a suit against Cauchoix, one of the endorsees, who succeeded in avoiding payment on the ground of want of due notice of protest, was received in evidence, as in the case of Montillet *v.* The Bank of the United States. 10 *Martin*, 365; 9 *Ibid.* 379.

Rowel *v.* Bohler *et al.* III, N. S. 348.

THIRD District.

According to the general principles of our laws, a mortgage creditor is bound, before he can legally seize hypothecated property in the hands of a third possessor, regularly to pursue his action of mortgage, *i. e.*, to obtain judgment against the original debtor, to produce it and the act of mortgage, and give ten days' notice to the possessor, &c. But there are several exceptions to these rules; one of which is the insolvency of the debtor and cession of his goods. From the evidence of the case, the appellee, Mrs. Fulton, is clearly entitled to the benefit of this exception, as it is shown that her husband has long since made a surrender of his property, and is apparently insolvent. See *Febrero, part.* 2, *book* 3, *chap.* 2, *no.* 85.

In the same authority another exception is found to the general rule: that is, where the title under which the third person possesses, is evidently null, "*en cuyo caso, y no en otro, si admete la excepcion nulidad, como notoria, para poder seguir la execucion.*" This provision does not appear to us, to militate against the general doctrine, as recognised by several decisions of this court, which requires proceedings to cause fraudulent acts to be annulled. In the present case the counsel for the appellant admitted in argument, that the deed under which she claims, is void and ineffectual in law, as having been executed without proper authority, and in a legal course of proceedings.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Hennen, for the plaintiff.

Watts and *Lobdell*, for the defendants.

Pierce *v.* Millar. III, N. S. 354.

FIRST District.

Decided, that the word *set-off* employed in the act of 17th February, 1821, "claims or demands against the said plaintiff, which by law he is or may be permitted to plead in compensation or set-off," is used by the legislature as synonymous with *compensation*, not as differing from it nor meaning *reconvention*. The translation in the French text of that law is "compensation," for both terms, compensation and set-off. This clue has been decided before, Breedlove and Bradford *v.* Turner, 9 *Martin*, 364, to be a powerful auxiliary in arriving at the true meaning, as showing the opinion decidedly of all that part of the legislature who speak French.

Where defendant offered evidence to prove an account, as part of his present claim in reconvention, to which reference is made in his answer, as on file in another suit, Millar *v.* Pierce, now pending in the same court: *Held*, that such evidence was inadmissible, that account being no part of this suit, but in issue in the other.

Allain *v.* Cornaux *et al.* III, N. S. 365.

FOURTH District.

If the case turns principally on a question of fact and there is a verdict by the jury, and the plaintiff appeals, without moving for a new trial, it will not be remanded for one.

Forstall *et al. v.* Forstall. III, N. S. 367.

COURT of Probates of New Orleans.

The question in this case is the same as that decided at length in Seghers *v.* Antheman, f. w. c., in 12 *Martin*, 639; 1 *Ibid.*, *N. S.* 73.

Ingrem *et al. v.* Ingrem. III, N. S. 369.

THIRD District.

Heirs who are full of age and who receive an estate purely and simply, may sue and be sued, in any of our courts of ordinary juisdiction, that have otherwise cognisance of the cause. Neither the provisions of the Civil Code in relation to the administering of estates, nor the reasons on which these provisions were founded, have any application to them. The effect of an acceptance, pure and simple, is to make the heir, without the authorisation of justice, seised of all the goods, rights and actions of the deceased, on the charge of paying the debts. He is not obliged to make an inventory. He becomes, therefore, owner of the property inherited, and responsible in his personal capacity, for all demands against the succession. Civil Code, 162, 73 and 75.

Where defendant, sued on his note for the purchase-money, objects that he has not a good title to the property purchased, he cannot claim security to warrant it, where there is no title set up in a third party, and the decision of the suit on the note will forever preclude the possibility of plaintiff's contesting it.

Naba *v.* Carlin. III, N. S. 373.

FIRST District.

A note sued on; defendant denies generally and pleads payment of usurious interest to an amount greater than the principal. Judgment below for plaintiff, this being taken as an acknowledgment of the instrument sued on, and no proof being shown of the usury.

PORTER, J., said:—Pleas inconsistent with each other cannot be pleaded: if the general issue and payment be pleaded the latter waives the former. An averment that the obligation has been discharged, renders needless, proof that it ever existed.

Syndics of Menard *v.* Pierce *et al.* III, N. S. 375.

COURT of Probates of New Orleans.

The power of the court of probates to enjoin its own writs is not derived from the species of property on which the execution was levied, but from the power which all tribunals possess over their own writs.

Proceedings in another court than that where the *concurso* is pending by a party to the *concurso* are illegal and void.

Semple *v.* Fletcher. III, N. S. 382.

Creditors cannot attack acts of their debtors unless they are injured by them. Hence they must show that sufficient property does not remain to pay their claims.

The legal mode of showing the insolvency of an estate, is by a settlement in the probate court.

THIRD District.

PORTER, J., delivered the opinion of the court.

The petitioner states that he was a creditor of Joseph Fletcher, deceased, in a large sum of money, that since his death he has obtained judgment for it, but has been unable to have this judgment satisfied, in consequence of the succession being insolvent. That the said Joseph Fletcher, during his life, made a donation *inter vivos* to one Elizabeth Fletcher, then living in open concubinage with him. That this donation is void for this and other reasons; he therefore prays that the property so conveyed may be declared part of the succession of his debtor, and that he may have such other relief as his case requires.

To these allegations the defendant answers: That she is the true and lawful proprietor of the property mentioned in the petition, and has been in possession of the same for the space of two years. That the estate of Fletcher is solvent, and that there is certain property in the hands of the executors and heirs, which the plaintiff is bound to discuss. That all the other allegations are false and untrue; and lastly, that, Joseph Fletcher, at his death, was largely indebted to her for services rendered in the capacity of housekeeper, and to discharge which debt he made the conveyance the plaintiff now seeks to annul.

The judge of the court below decided in favor of the defendant, and the plaintiff appealed.

The appellant has made in this court the following points:

1. That the testimony of Flecker & M'Rae ought not to have been admitted.

2. That the donation *inter vivos* being made when the donor was *in extremis*, has no greater effect than a donation *mortis causa*, and must be postponed to debts.

3. That as a donation *inter vivos*, it is void for want of transcription according to law.

4. That the donee being a married woman, the donation is void, for want of husband's authorisation to accept.

5. That the donor and donee being in adulterous concubinage, he could not donate, or she receive.

6. That the donation is void, as against prior creditors, the estate of donee being insolvent.

7. That the donation is void, being made with a view to defraud creditors.

For the understanding of the first point, it is necessary to state more particularly the act under which the defendant claims. It is a public instrument, by which Joseph Fletcher declares, that he had given, granted, transferred, aliened, and conveyed, to the defendant, the property therein mentioned, and that she accepts the donation. The parol evidence offered, and admitted on the trial, went to prove that there existed a consideration for this conveyance; that it was a sum which the donor owed the donee, and that the former had made declarations to that effect. This testimony was objected to, on the ground, that the donation by the terms of the act, being a pure and simple one, no evidence could be received to show it was one of a different character. We think the objection a good one, and that the judge below erred in overruling it. The proof received went to change the entire character of the act. As written, it was a donation, purely such. With the testimony it became a *donation remuneratoire*, which is nothing more than a *dation en paiement*. *Pothier, Traité du Vente*, 607; 12 *Martin*, 649.

Nor do we think that the right of the defendant to contradict his own act is in the least increased by the circumstance of this action being commenced by a person not a party to it. The point has been already made in this court; and the view then taken of the subject, has not been shaken or impaired by the argument in the present case. 12 *Martin*, 404.

The donation therefore stands before us, as one made without any other consideration than that of beneficence, and the right of the parties must be examined in relation to it as such.

The first, second, third, fourth and fifth objections to its validity, are, that it is void by being made *in extremis*, for want of transcription, from defect of legal acceptance, and from the parties being at the time of the grant in adulterous concubinage. Several of these questions are of considerable importance to the community; and there are more than one of them so doubtful, that it is, no doubt, desirable they should be settled as soon as possible, by judicial interpretation. But they are not necessary to the decision of this case, and we therefore forbear to touch upon them. The plaintiff, who attacks this conveyance, does not present himself before this court in such a manner as authorises him to raise these questions. Creditors have no right to intermeddle with the conveyances or contracts of their debtors, unless they are injured by them. Had the present debtor been alive when this suit was instituted, with property sufficient to pay his debts, the appellant certainly could not have established any interest in regard to his transactions, which would have enabled him

to maintain his action. It is not seen how the circumstance of his death has, in any respect, increased this right. Chirograph creditors, who attack the acts of their debtors, must lay as a ground of action, and establish it, that these acts have injured them. They cannot have injured them, if there be sufficient property left to pay their claims. Hence the necessity of their alleging and proving the want of effects to satisfy the debts due them. Has that been done here? We think not. The evidence of this insolvency is furnished, it is said, in the parol testimony of witnesses who swear that the estate is insolvent; in the declarations of the executors, when suit is instituted on the present demand; and in a return of the sheriff on the execution issued against the executors, which shows that it was unsatisfied for want of effects to levy on.

Parol testimony is not the legal mode of showing the incapacity of a debtor to pay his debts; and the witnesses introduced here do not even positively swear to it. The parish judge declares, that ever since he came into office, he has considered the estate as insolvent; that the executor has deposited his papers in his office, but that no settlement of his accounts has taken place. Scott swears that he believes it insolvent to a large amount. The declaration of the executors, taken in relation to the pleadings in that case, are still less evidence of the insolvency; and if they were express to the fact, which they are not, they are contradicted by the averment in the present plaintiff's petition that the donor left sufficient property to pay all his debts. Neither is the return of the sheriff proof of the want of funds to discharge this debt, because the writ itself was illegal, and could not have been levied on the moneys in the hands of the executors to be administered.

The incapacity of the estate left by Fletcher to satisfy his creditors, should have been shown by a settlement before the only tribunal in which it could have been settled, in the court of probates; and that not having been done here, we are of opinion the present plaintiff cannot maintain this action.

We think, however, that instead of the judgment being final, one of nonsuit should be rendered.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff, as in case of nonsuit, with costs in the court of the first instance, the appellee paying those of appeal.

Watts and *Lobdell*, for the plaintiff.

Preston, for the defendants.

Butler *v.* Kenner *et al.* III, N. S. 388.

FIRST District.

This was an application of plaintiff to issue an execution on that part of a judgment which had not been enjoined, which application though unanswered by defendant, had been set for argument, and continued over several times, and on the last day, defendant not appearing, was submitted by plaintiff without argument; on the 28th, the court either had, or was ready to pronounce judgment, when the defendant filed an answer and prayed for a jury. This the judge properly disregarded: the application to change the mode of trial came too late.

Mackey *v.* Trustees of the Presbyterian Church. III, N. S. 390.

A second writ of *fieri facias* cannot be issued until the first is returned.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This is an appeal from a judgment rendered by the court below, on a motion to set aside and annul an execution which had issued on a judgment obtained by the plaintiff and present appellant, against the defendants and appellees.

The record shows that a *fieri facias* had issued previous to the one which forms the subject of the present dispute, and had been returned by the sheriff, executed by seizing in the hands of Mr. Hall, agent for a certain lottery, the moneys, goods, chattels, and other property which he might have, belonging to the defendants.

It does not appear that any disposition was made of the property thus seized, before the issuing of the second writ, which was quashed by the district court. To allow seizure after seizure under execution at the whim and caprice of plaintiffs, without any attempt to sell the

property first taken by the sheriff for the purpose of satisfying judgments, might lead to extreme oppression on defendants. Such a course of proceeding, is, in our opinion, not tolerated by law; and ought to be arrested as soon as possible. The court below, therefore acted correctly, in sustaining the defendants' motion, and quashing the second writ. See 2 *Martin's Dig.* 168; 2 Bacon, 719, 720, and 717.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Morse, for the plaintiff.

Hennen, for the defendants.

Shaw *et al. v.* Thompson. III, N. S. 392.

FOURTH District.

Held, there can be no doubt, that if the inferior court discover that an interlocutory order rendered by it is erroneous or improper, it may correct the error by setting such order aside. Defendant propounded the interrogatory, whether plaintiffs, previous to the inception of the suit, had not transferred the note sued on to a third party, and whether they were now owners of the same?

The Court said:

We had occasion to examine and decide this point a few days since, in the case of Banks *v.* Eastin, *ante*, 90. The argument offered in this, presents no new view of the subject, and we see no reason to change the opinion there expressed. The suit appears to have been brought by the persons having the legal interest in the instrument sued on. Whether they were the owners or not, was a matter with which the defendant had nothing to do; as the judgment here formed *res judicata* against any other who might hereafter have claimed an interest in it. In the case of Moore *v.* Maxwell *et al.*, 2 *N. S.* 249, the plaintiff, by his own showing, had neither a legal or equitable interest in the note sued on.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Grymes, *Watts* and *Lobdell*, for the plaintiffs.

Dumoulin, for the defendant.

Bouthemy's Heirs *v.* Dreux's Syndics. III, N. S. 393.

FIRST District.

The reversal of the judgment of the inferior court gives costs to the appellant.

Guibert *v.* Herpin. III, N. S. 395.

FIRST District.

The curatrix, having given money to be laid out for the estate, may sue for it of the person to whom she confided it in her own name, and if she do, it is clear her husband's debt to defendant could not be pleaded as a set-off.

Seymour *v.* Cooley. III N. S. 395.

A parish judge, *as such*, cannot receive and certify a vendor's acknowledgment.

A private deed acquires no authenticity by being enregistered.

A patent dated in 1813, is a superior title to a report of commissioners in 1816, in favor of a settler.

FOURTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff claims a tract of land, purchased from General Lafayette, to whom it had been granted by the United States, on the 25th

of March, 1813. The defendant sets up a title by conveyances in 1806 and 1809, from persons whose right was formally reported on by the land commissioners of the United States, on the 22d of March, 1816.

There was judgment for the plaintiff, and the defendant appealed.

The plaintiff produced the patent of the United States to General Lafayette, and his conveyance, as stated in the petition.

The defendant offered in evidence,

1. The copy of a private sale, by Mrs. Bougant, to him, of part of the premises. Under the sale, are two certificates from the judge of the county court, and a justice of the peace, attesting—the first, the possession of the vendor for twenty-five years; the second, that her late husband had a grant for thirty-five years; that he devised them to her, and that she possessed them till the sale. The parish judge certifies the acknowledgment of the sale by the vendor, and orders it to be recorded.

The reading of the sale was objected to; the objection overruled, and a bill of exceptions was taken.

The sale was a private one, and therefore required legal proof. Its acknowledgment, certified by the parish judge, would be evidence; if acting in his capacity of a notary public, he had been attended by two witnesses, and had caused the vendor to subscribe his acknowledgment. As a judge, he was without authority to receive, or certify the vendor's acknowledgment.

The certificate of the judge of the county court over that of the justices, could not be received.

The certificate of the parish judge ordering the record, and the subsequent averring the fidelity of the copy, add nothing to the authority of the title. We think the judge erred in receiving the documents as evidence.

2. The copy of a sale made by the same person to the defendant of part of the premises.

It was objected to, because the execution of the deed was proved no otherwise than by a signature of the justice of the peace, before whom it purported to have been executed.

We think it ought not to have been received. The sale was a private one—the signature of the justice gave it no authority—and the act did not acquire any, by its being registered. Marie Louise *v.* Cauchoix, 11 *Martin*, 243.

3. A copy of the report of the land commissioners of the United States was next introduced. Its date was March 22d, 1816. It is a favorable report of the defendant's claim to land purchased from Mrs. Bougant. It states that the claim had been before the late board, who had rejected part of it, on the ground that it had been abandoned by the late proprietor; the other part is said not to have been acted on, probably from oversight.

4. A list of claims favorably reported on, including the defendant's.

These two last documents we think were legal evidence. The

copies are from the register of the land office; and their contents are pertinent to the case.

But the defendant is unable to connect his right, with that which he urges to result from the favorable report of the officers of the United States. Yet if this report showed a complete right in another person, as it would show a title out of the plaintiff and his grantee, the defendant's possession could not perhaps be disturbed.

But the date of the report is of March, 1816, and the general's patent of the same month, 1813. Giving to the report the full effect of a complete grant, the grantors had no longer any interest to grant in the land.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Derbigny, for the plaintiff.

Guirot *v.* Guirot's Syndics. III, N. S. 400.

FIRST District.

A minor, not emancipated, is incapable of binding himself by a contract, Civil Code, 264, art. 14, unless it be proved that the contract turned to his benefit.

Henderson *v.* Griffin. III, N. S. 403.

FIRST District.

The payee of an order cannot recover of the drawer without showing demand on, and notice of non-payment by drawee.

If one buy a *judgment* debt, he cannot be forced to pay the price, if the claim was only *in suit* at the time of sale. See Hill *v.* Martin, 12 *Martin*, 177, where the distinction between negotiable paper and that which is not, as to *laches* of plaintiff, are fully gone into.

EASTERN DISTRICT, MARCH TERM, 1825.

Goodwin *v.* Heirs of Chesneau. III, N. S. 409.

Bills of exceptions cannot be taken to final judgments.

A judgment of eviction cannot be pleaded as *res judicata* against a claim of the vendee for damages.

Transaction may include *partition*, as partition includes alienation and sale.

The same rules which govern partitions, *strictly such*, do not apply to every act by which the community of property is destroyed.

It is a fiction of law to prevent lesion, that all acts which put an end to the community of property are to be regarded as *partitions*.

A contract by which the step-father renounces all right to his wife's estate on receiving specific property, is not a partition.

If one of the parties to a contract of exchange be evicted, he may sue for damages or the thing he gave, and if it be a minor who evicts him, he must restore the object received, if in his possession.

The first vendor may be sued in warranty, by his immediate vendee, upon the person, to whom the vendee sold, being evicted, unless the first vendee alienates without warranty.

COURT of Probates of New Orleans.

PORTER, J., delivered the opinion of the court.

This suit appears to have grown out of the decision of this court in the case of the Heirs of Chesneau *v.* Sadler. That was an action in which the plaintiffs claimed certain property descended to them from their mother, and which their tutor had alienated contrary to

law. The defendant set up title to it under the plaintiff in this case, and cited him in warranty. The judgment of the court was in favor of one of the petitioners, and against the other two, on the ground that they had, after coming of age, ratified the act of their tutor. 10 *Martin*, 726.

The petition in the present case recites at length the proceedings, and avers: That the plaintiff was entitled as devisee, under the will of the mother of the present defendants to a large portion of her property; that he and their tutor, Girod, entered into a transaction, or amicable compromise, in regard to the rights accruing to him under the testament; and that he never would have made such agreement or transaction, had he not believed the same to be a final settlement with all the heirs of his deceased wife. That inasmuch as the said transaction has not been executed in the manner intended, and the same has been declared illegal and void in part, at the suit of one of the heirs, whom the tutor represented, it is null and void as to all the parties thereto. It concludes by a prayer, that the petitioner be reinstated in all his former rights and claims relinquished in said transaction, as if the same had never taken place; that there may be a liquidation, settlement and partition of the property in community, between the petitioner and the heirs of the deceased's wife, and that he have such other and further relief as his case may entitle him to.

To this petition the defendants pleaded:

1. That the plaintiff could not maintain this action, because he had no interest in the cause, having received full compensation from the defendants' tutor for all claims against the succession of their mother.

2. That all the facts and allegations in the plaintiff's petition are untrue.

3. That the will under which he claims is null and void.

4. That if the petitioner be entitled to any thing, it is only his share in the profits which might have resulted from the community with his deceased wife, but which profits the defendants deny to have ever existed.

To these means of defence were subsequently added the pleas of *res judicata*, and prescription.

The court of probates was of opinion that all the matters and things in dispute between the present parties, had been decided in the case of the Heirs of Chesneau *v.* Sadler, and gave judgment in favor of the defendants, as in case of nonsuit. From this judgment the plaintiff appealed.

There are no less than five bills of exceptions on the record to the final judgment of the court, two of them are to conclusions drawn from different parts of the testimony, which the judge on signing, declares he never took into his consideration, nor had formed any opinion upon. Bills of exceptions, it is well known, do not lie to

final judgments, and we notice these, only to express our disapprobation of the irregularity, and our hope that it will not again occur.

The first plea of the defendants, that the plaintiff has no cause of action against them, cannot be correctly examined, until an inquiry is gone into, in relation to the original contract between the tutor of the defendants and the petitioner: and the rights which accrued to the latter from one of the heirs having sued and recovered part of the property conveyed in it. That of *res judicata* needs no such previous examination, and its validity is the first question for our consideration.

This court is unable to discover any, the slightest ground in support of the decision of that of the first instance, that the matters and things now at issue in this cause, were decided in the case of the Heirs of Chesneau *v.* Sadler. There, the plaintiffs sued for certain property, which they claimed in right of their mother, deceased. The defendant called in warranty, the plaintiff in this suit, who supported the title of his vendee, by relying on the *transaction* with the tutor, and citing him to defend the property conveyed to him. The judgment of the court was, that the title was insufficient to prevent one of the plaintiffs from recovering. Here the plaintiff alleges, that in consequence of this judgment, by which his vendee was evicted, the whole transaction is rendered null and void, that he is thrown back on rights existing anterior to that transaction; and which rights, though not offering a defence to the claim for the property, enable him in turn, to demand a partition of the whole succession of his deceased wife. Instead, therefore, of the matters and things now contested between these parties, having been decided by that suit, they were in truth created by it, and if the present action has any grounds of support, they grow out of the judgment in that case.

This is so manifest in respect to the heir who succeeded in that action, that the point was not much debated by the appellees' counsel; but he urged that the plea, applied at least, to the two defendants who failed in their attempt to recover the property. For this position we see no more foundation, than that just disposed of. It may be true, that the judgment in that case has not furnished the plaintiff with a cause of action against the defendants, but it is clear that the object of this action, and the matters involved in it, are quite distinct from those contested in the former suit.

Whether the plaintiff might not have set up, when cited in warranty, the same claims which he does now, need not be inquired into. The fact is, he did not do so, and that is sufficient to prevent him being barred by the judgment there rendered, as the matters and things now contested, were not necessarily embraced by it.

The plaintiff rests his claim to a partition of the whole of the estate of his late wife, upon the ground, that the act under which he claimed the property, being a partition of the estate in community, between him and his co-heir, it follows, that if annulled as to one, it is void to all the parties who concurred therein.

[Goodwin v. Heirs of Chesneau.]

For the better understanding of the different questions raised in this case, it is necessary to set out the material parts of the act under which the present plaintiff acquired the property, from which his vendee was evicted; and state some of the circumstances that led to its execution.

The mother of the defendants, by last will and testament, gave to her husband, the present plaintiff, the usufruct of one-fifth of all the property owned by her at her death. After her decease, difficulties arose between the tutor of her children, and the plaintiff, in relation to his rights, under the will, and a claim which he set up for acquests and gains, made during marriage. These difficulties ended by the parties entering into an agreement, by which the plaintiff waived certain property, and abandoned all claims to the succession.

The act which evidences this agreement, purports to be executed by Jean Goodwin, of the one part, and Nicholas Girod, tutor to the children of Jean Chesneau, of the other.

It states that the parties, to avoid all kinds of dispute which might arise between them, in relation to the partition of the succession of Mrs. Susan Drouet, widow of Jean Chesneau, deceased, had entered into the following agreement:

That the said tutor abandoned to the said Goodwin certain property therein mentioned.

That in consequence thereof Goodwin abandoned purely and simply (*fait l'abandon pur et simple*) all and singular the pretensions which he might have on the succession of the deceased Susan Drouet his wife, such as acquests, and legacies, which might have been conferred on him by the testament, and agrees that the said Girod in his quality aforesaid, should take possession of all the property which belonged to the succession.

This act is said to be a partition and not a transaction. Whether the former be included in it or not we will hereafter examine; but that it is at all events the latter, there cannot be a doubt; rights are claimed by one party; difficulties with regard to giving them effect feared by both; property delivered to procure an abandonment of them; and that abandonment made. Our Code defines a transaction, an agreement by which two, or more persons, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent. It is unnecessary, we conceive, to go into any reasoning to show, that the contract here submitted to us, is most clearly within the meaning of this provision; or that the plaintiff himself has committed no error in denominating it a transaction, in the sale which he made of the property, in the pleadings in the former suit, and in the repeated annunciation of it as such, in the petition filed in this cause.

But notwithstanding this is the true character of the act; it does not follow that it may not also have operated a division of the succession. Transaction may embrace partition, as partition includes alienation and sale. Civil Code, 186, art. 162.

But whether this act include partition, strictly such, may well be

doubted. It seems to want all the characters of one. It was clear the parties did not contemplate it to be such. They expressly declare the agreement is entered into to avoid the difficulty of partition. Common effects are not divided. On the contrary the husband receives in full property that in which he could only have had a usufruct, and he is discharged from the payment of all debts due by the succession.

In one point of view indeed the act may be considered as a partition, and that is, as terminating the indivision of property which existed between the parties; not by separating the things of the estate, but by dissevering the right which existed in them. Every act which produces that effect, whether it be sale, exchange, or donation, must be considered such; indeed this must necessarily be the case, otherwise the property would still be in common, and subject to division.

It is in this sense the court understands the elementary principle of our law, that the right to partition cannot be renounced; and it was for the reason just stated, and in order to prevent an evasion of the rules in respect to *lesion* which governs transactions of this kind; that a fiction was introduced, that all acts which put an end to the community of property existing between parties, no matter of what nature those acts are, or by what name called, are regarded as partitions. Civil Code, 186, 159. Chabaud on Successions, vol. 3, 704; *Toullier, Droit Civil Français, lib.* 3, *tit.* 1, *chap.* 6, *no.* 577.

But it does not follow that the same rules which govern partitions, really such, apply to every act by which the community of property is destroyed. Our Code furnishes us, with express authority to the contrary. In ordinary partitions, it suffices to cause rescission that there be *lesion* of more than one-fourth part of the true value of the things partaken. But if this partition is affected through a transaction, or by the sale of the rights of one co-heir to another, the contract cannot be rescinded for this cause. Civil Code, 206, art. 253, 254.

Yet in the case last put, there is clearly, in fiction of law, a partition; that is, the community of property is destroyed. The rule then, we see, has its exceptions; and it is not correct to say, that in all cases, where the commnnity is dissolved, the principles which govern partitions, must regulate the contract of the parties.

On the contrary, we conceive that unless the provisions of the law, in respect to *lesion* be violated; agreements, by which the right of one heir in a succession, are transferred to another heir, or to a third party, must be governed by the rules applicable to that species of contract, by which the transfer is made; whether it be sale, exchange, donation, or in any other mode.

The question is in some measure novel, but we are not without authority on it. We have the judicial exposition of laws, which are *verbatim* the same as ours. One of the heirs to a succession opened in France, sold his right in it to a co-heir, who failed to pay the price. On the former attempting to enforce the contract as one of

sale, an objection was made that it was subject to the rules which regulate partitions. The court held that the act was one of sale; that no other character could be assigned to it. It united all the characters. *Res, pretium, et consensus.* That the rule which prescribes that all acts tending to destroy the community are regarded as partitions, was a fiction introduced to prevent *lesion.* That it was a principle, that fictions in law did not extend beyond the particular cases for which they were established, and that for all other purposes the contract must be governed by the ordinary rules. *Journal du Palais, vol. 2,* 1812, 530; *Manuel du Droit Français,* 296; in note. Code Napoleon, 887, 888.

In the instance now before us, unless we shut our eyes on truth, and indulge in fiction, we cannot mistake the real character of the act on which this difficulty has arisen. So far from it being a partition of property held in common, it contains an abandonment of all right to it; objects which belonged to the heirs, and on which the step-father had only the usufruct for life, are given to him in full property. In consideration for the property thus received, and in consequence of being released from the payment of the debts due by the community, he renounces all rights which he had to the acquests and gains made during marriage, and those which he might possess under the will of his wife. In such an agreement, we look in vain for that act, which our Code speaks of, when it defines a partition to be "the separation, division, or distribution of a thing common to several co-proprietors or co-heirs, who enjoyed the same undividedly." Civil Code, 184, art. 157.

On the contrary, it appears to us, an acquisition on the part of the plaintiff, of property belonging to others, and for which he gave his rights on a succession in return. Such agreement formed a contract of exchange, which is defined to be, where "the contractors give to one another, one thing for another, whatever it be, except money." Civil Code, 370, 1.

In case of eviction, the party evicted has his choice, either to sue for damages, or for the thing he gave in exchange. If that thing be still in the possession of the minor, by whom he was evicted, the plaintiff has the right to get it back. Civil Code, 370, 4.

And this brings us to an exception, made in an early stage of the proceedings, that the plaintiff had no cause of action, the right being vested in Sadler, the vendee of the plaintiff who was evicted by the judgment which has given rise to this action.

The only ground which the court can imagine this objection to rest on, is, that as the plaintiff has not shown that he has paid Sadler, he has suffered as yet no injury from the eviction of which he complains; or in other words, that no cause of action arises in favor of the first vendee, by the person to whom he sold being evicted, until it is shown the latter has exercised his action of warranty, and recovered.

This objection, (which on the first consideration, appeared to be

supported by analogies drawn from the rights of persons, standing in some respects, in the same situation with the plaintiff,) cannot be maintained. By the warranty, the vendor contracted, not only that the vendee should not be evicted, but that all other persons who held under the buyer, should enjoy the thing. There is an exception to this rule, where the first vendee alienates without warranty. Because he is then without any interest whatever in the matter. But in every other case his right of action is complete, the moment the person to whom he sold loses it by a superior title. *Dig. liv.* 21, *tit.* 2, *l.* 61, 71; *Pothier, Traité du Vente, no.* 97.

The other questions raised in argument, belong to the merits; and as the cause is not now in a situation in which final judgment can be given here, no opinion can be expressed on them.

It is, therefore, ordered, adjudged and decreed, that the judgment of the probate court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this cause be remanded to the court of probates, to be proceeded on according to law, the appellees paying the costs of this appeal.

Watts and *Lobdell*, for the plaintiff.

Seghers and *Appé*, for the defendants.

Mellon *v.* Croghan. III, N. S. 423.

Where a note is made payable at a particular place, payment must be demanded there, before recovery can be had of the maker.

But a failure to demand, on the day the note falls due, will not discharge him, though it may the endorser.

The place of payment is *accidental* to the contract, not of the *essence* of it.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petition in this case sets out, that the defendant is justly indebted to the plaintiff in the sum of 686 dollars and 15 cents, the amount of a promissory note drawn and subscribed by said defendant in favor of the petitioner, dated New Orleans, January 1, 1823; payable twelve months after date, as will appear from a copy annexed, and made a part of the petition, the amount whereof the said Croghan neglected to pay when amicably demanded.

The note annexed, corresponds with that set out, except in being made payable in the Louisiana State Bank.

The defendant admits the facts alleged in the petition, but denies they establish any liability on his part to pay the note sued on.

The judge below was of opinion, that a demand at the place specified in the note, was a condition precedent to the plaintiff's right to recover, and gave judgment for the defendant. The former appealed.

The case has been submitted without argument.

This is a most controverted question, and hardly any subject has been presented to us on which a greater weight of authority is found arrayed for, and against the principle, on which the judge *a quo* decided the cause.

The following are cases to show, that if the place of payment be embodied in the note, a presentment at the place must be averred, and shown, to charge the maker. 14 East, 500; Starkie's *N. P.* 468; 16 East, 110; 5 Taunton, 30; *Ibid*, 344; 3 Maule & Selwyn, 150; 4 Maule & Selwyn, 462.

It has, however, been decided in the cases hereafter quoted, that a demand at the place specified in the instrument, is not necessary to charge the maker. 2 Campbell, 498; 4 Maule & Selwyn, 150; 3 Johnson's Cases, 71; 6 Mass. Rep. 524; 8 *Ibid.* 480; 13 *Ibid.* 566; 17 Johnson, 248.

The difference in opinion to be discovered in these cases appears to be principally confined to the courts of England. In our sister states the preponderance of authority seems greatly in favor of the position that a demand at a particular place is not necessary.

There has been a case lately decided in the house of lords, in England, where the law on this subject received a very full examination. The very point now before the court was much discussed, though the question presented for decision was not the same. It arose there, between the endorsee, and acceptor of a bill of exchange. As all the judges delivered their opinions, the case would be one entitled to great respect as evidence of the commercial law, were it not for the extraordinary diversity of sentiment which it exhibits. Indeed there are scarcely two that agree on all the points submitted to their consideration.

It is stated by several of these learned persons, that if a promissory note be made payable at a particular place; a demand at that place is a condition precedent to recovery against the maker; but that it is not absolutely necessary it should be made on the very day on which it falls due, the time only being of importance when the endorser is to be charged. 2 Broderip & Bingham, 165.

The judges who contest the necessity of making a demand at the place specified, and who hold that the making of a note renders the maker universally liable, in answer to this argument, declare, that they are unable to distinguish between place and time. That if the former be required, so must the latter, and hence they conclude, the

holder would lose his right forever, if he did not demand payment on the very day the note fell due. The Supreme Court of New-York, which establishes a different rule, seems also to think, that such would be the inevitable consequence of recognising the doctrine, that a demand at the place is a condition precedent to the right of recovery. 18 Johnson, 246.

If this consequence were to follow, the requiring a demand at the place specified, it would furnish a strong argument against adopting the rule; but we are unable to discover any ground for this apprehension, and we think the distinction on this head clear between the obligation of the endorser, and the maker. By the law merchant the contract of the former is not absolute, but conditional. He becomes responsible only on default of the maker to pay, and due notice being given of that default. His engagement is *stricti juris*, and so anomalous, that it will neither furnish analogy for ascertaining rights under other contracts, nor be elucidated by reference to legal obligations flowing from them. It is entirely the creature of commercial usage, and was introduced for the ease and convenience of trade; it being considered, or supposed, that it was of great importance to the facility of its operations, that the endorser should have immediate notice of his liability. By a parity of reasoning it has been held by some, he is discharged, if demand of the maker be made at any other place than that specified in the instrument. The question is not presented for decision here; therefore, it is improper it should be now settled; but admitting he is, what analogy does his case present, by which the obligations of the maker can be ascertained?

He, instead of coming under a conditional obligation, makes by the very terms of the instrument, an unqualified promise to pay the payee, or whomsoever he may direct. His obligations are entirely distinct from those created by the law merchant. They would be the same if that law were stricken from our Code of jurisprudence, and in testing the extent of his liability, under the promise contained in the note signed by him, we do not see how it can be distinguished from an obligation, which did not contain words that made it negotiable. Indeed those who maintain this doctrine, do not place it on the ground, that it flows from any of the rules peculiar to negotiable paper.

But it appears to us that those who contend for such a rule, overlook or confound two things, entirely distinct; the substance of the contract, and the mode by which it is to be discharged. To those acquainted with the doctrines of our jurisprudence, nothing can be more familiar, than the distinction between those things which are of the essence of the contract, and those which are accidental to it. Among the latter, says Pothier, are the liberty of paying by instalments, the allowing a certain time for the payment of money, and the like. On this principle, the Roman jurists considered, that the specification of a particular place for payment, was supposed to be made for the advantage of the creditor, as well as the debtor, and therefore, the latter could not compel the former to receive it else-

where. But the creditor might demand payment at any other place, making compensation to the debtor for any damage he might sustain by the change; and could enforce the contract elsewhere by a suit under this condition. *Dig. liv.* 13, *tit.* 4, *l.* 1 and 9; *Pothier on Obligations, no.* 8.

The principal reasons on which the law has been lately settled in England, that a demand is necessary at the place appointed for payment, are: first, that according to their jurisprudence, it is a condition precedent; and secondly, the serious inconvenience that would result from a different rule. The latter consideration appears to us entitled to great weight. It consists principally in this: that merchants who are travelling from place to place, cannot conveniently carry funds with them; that for ease and convenience they deposite their money at a banker's, or merchant's, where they make all their acceptances or notes payable; and that it might expose them to loss, inconvenience, and in some instances, the ruin of their credit, if demand of payment could be made of them elsewhere. As in the case of a merchant of New Orleans going on business to London, Paris, or New York, who makes a note here before be sets out, payable at his domicil or his banker's. If demand be not necessary at the place designated, the bill might be sent after him, and he arrested in another country, the moment it fell due. This reason loses somewhat of its weight, when the domicil of the obligor is in the same place, where the bank is fixed at which the note is made payable, and the personal demand is made at the residence of the maker. But some general rule must be followed, for the facility of commerce, and we think, after mature reflection, that it is safer to adopt that we have just stated. It imposes no hardship on the payee; for if he choose, he may refuse an obligation in this way, and thus retain his right to demand payment wherever his debtor be found. It must be supposed such a clause is introduced for some purpose, and no other can be imagined, than that it is at the place designated, the obligor will have funds to meet his obligation, and there the obligee will seek them. A contrary rule would require the obligor to have funds at two places to meet his engagement.

Deciding in this way, is in conformity with the rules of our own law, which do not consider the debtor in fault (*en mora,*) until demand is made at the place fixed for payment. *Curia Phil. lib.* 2, *cap.* 7, *paga. no.* 20.

The judge below gave final judgment against the plaintiff; we think there should have been one of nonsuit. He ought to be permitted to yet make a demand at the bank, and if not paid to sue the defendant and recover the amount due.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of nonsuit, the appellee paying costs in this court, and the appellant those of the court below.

Lockett, for the plaintiff.

Pierce, for the defendant.

Chadwick *v.* Waters. III, N. S. 432.

COURT of Probates of New Orleans.

Plaintiff had served as engineer on board of the Neptune and ashore, and afterwards on board of the Alexandria, wherein he was part owner. He brought suit for compensation for both: prescription was pleaded to the former.

The Court said:

The services of the plaintiff on board of the Alexandria cannot be connected with those on board of the Neptune. The latter were rendered to Waters, in his own right, in a boat of which he was the sole owner. These rendered on board of the Alexandria, were rendered to, and must be paid by a company, of which Waters was the agent and in which he was concerned for a part only. These services appear to have been satisfied, according to the plaintiff's receipt, or for the greater part, and entirely, if we give credit to the entry on the boat's books, which the plaintiff's counsel suffered to be read, without any objection.

Clendenning *v.* Clendenning *et al.* III, N. S. 438.

A woman who was deceived by a man, who represented himself as single, and her children born while the deception lasted, are entitled to all the rights of a legitimate wife and children.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff resists the claim on the succession of his father, of a woman whom he married, in the lifetime of his wife the plaintiff's mother: and of the children born from this union. The defendants contend, that notwithstanding the plaintiff's father had a lawful wife,

at the time of the second marriage, as the woman he last married, was in good faith, at the time of the marriage, and ever since, at least till after the birth of the last child she had by him: her marriage has its civil effects, and she, and her children, the present defendants, are entitled to all the advantages the law gives to a lawful wife and children. Their case was supported in the district court, and the plaintiff appealed.

There seems to be no dispute on the question of law. The woman, who was deceived by a man, who represented himself as single, and his children begot while the deception lasted, are *bona fide* wife and children, and as such, entitled to all the rights of a legitimate wife and issue.

It is, however, shown, that the first child was born within four months from the celebration of the marriage. This may be evidence of too much faith in the mother, but as a lawful marriage, cures an irregularity of this kind; a *bona fide* one on the part of the deceived woman, must have the same effect.

It is next urged, that the other children, four of them, were born after the deception ceased, and consequently the good faith of the mother had ceased. If this be the fact, the plaintiff must, as to such children succeed. For it was the duty of the deceived woman, as soon as she became satisfied with the existence and consequent rights of the first wife, to forbear a violation of them.

The evidence of the knowledge and existence of the first wife by the mother, is said to result from the depositions of several witnesses, who testify that they frequently conversed in the house of the plaintiff's father (the deceased), with him, about his first wife, and the plaintiff, their common child. But except as to two of the witnesses, this circumstance has no weight, because there is nothing from the testimony that enables us to conclude any of these conversations took place, in the presence or hearing of the woman.

The only witnesses who testify to any conversation of this kind, from which the woman might have been undeceived, are Kilpatrick and Hodge.

Kilpatrick says, he was introduced by the plaintiff's father to this woman, as being acquainted with his wife in Tennessee; the plaintiff's mother.

Hodge deposes, that when he was about leaving the deceased's house, he wished to give him 50 dollars, to be applied to the education of his son, the plaintiff then in Tennessee, and the woman objected thereto.

The testimony of Hodge affords no support to the plaintiff, because it only shows the woman's knowledge of the existence of a son of the person she married; who might be an illegitimate one, or one whose mother was dead.

The counsel for the defendant has found some difficulty in destroying or weakening the effect of Kilpatrick's testimony.

[Clendenning v. Clendenning *et al.*]

The case was submitted to a jury, and they could not agree on a verdict.

The judge *a quo* was of opinion, the proof of knowledge offered was not sufficient. The weight of the opinion of the first judge, great with us on questions of fact, is greatly diminished by the circumstance that he acted on written testimony. He did neither hear nor see the witnesses deposing. So he enjoyed no advantage that we do not; and although every one of us is very ready cheerfully to disown any superiority over any of the gentlemen, who preside in the courts from which appeals come up, we cannot help being conscious of the advantage this tribunal possesses over every other in the state, in the number of its members.

On a question like this, the proof must be irrefragable. Nor is the circumstance of this woman having had Kilpatrick introduced to her, (by the person whom she did then confide in as her husband, and the lawful father of her children,) as a person being acquainted with his wife in Tennessee, irrefragable proof, that she then received such evidence of the fact of the existence of his first wife. At first blush, it seems, this question considered in the abstract ought to be decided in the affirmative.

But—The witness appears to have been a traveller from Tennessee, whose natural language was the English, and we have nothing from which we may conclude he knew a word of French.

The deceased's natural language was also the English. He had been some time in Louisiana, and with what accuracy he spoke the French language, we are without information.

The woman's natural language is the French; of the degree of her knowledge of the English, we are also without information.

The witness does not tell us in what language this introduction was given. We must conclude it was such a language the witness and the other two persons understood. The English being the vernacular language of two of these three persons, it is most probable it was the language spoken, as there is nothing from which we may assume that the witness spoke French.

The witness relates a conversation which took place upwards of fourteen years before the time he delivered his testimony. At that time, the deceased had been about five years from Tennessee, and had been married for the second time, but eight or nine months.

There is no evidence that before her marriage, the woman was so conversant with persons who spoke English, as to have acquired that language. The parish in which she resided was one, the population of which is almost exclusively French.

The testimony is silent, as to the conduct, behavior or answer of the woman, on receiving then, the first intimation of a fact, in which she was so materially interested. The counsel urges, that in the absence of any account, we must presume it was received without emotion, and this is presented as a violent presumption: which if not

counteracted, must be received, and stand as evidence of anterior knowledge—anterior even to the marriage.

A knowledge anterior to the marriage cannot well be believed on the testimony before us. For to what use would such a marriage be to the woman? A man might seek it to attain to the possession of a woman he could not otherwise procure. But men have so much less charms, or so much more liberality, that women are seldom put to such straits.

We therefore conclude, that there is no evidence of a knowledge anterior to the marriage, or to the conception of the first child, who was born four months after it, and he must be considered as legitimate.

The legitimacy of the other children, depends on the want of the knowledge of the first marriage, in the mother at the time of their conception.

We think the testimony is not sufficient to establish this knowledge. It cannot be assumed from any part of the testimony, except the part of that conversation related by Kilpatrick.

The deceased had been anxious to conceal every thing that concerned him, and for that purpose had changed his name. It is so very improbable that the woman would, without emotion, hear herself reduced from the rank of a wedded dame, to that of a harlot, on Kilpatrick being introduced to her, that this fact must be proved beyond the probability of a doubt before assenting to it.

Kilpatrick, it appears, does not give the very words used by the husband. Indeed at the distance of fourteen years and upwards it would be strange that he could. It is more likely the woman understood he was spoken of as a man who had been acquainted with the first wife. A mistake in the tense may well happen, among persons whose native language is not the same.

The profligacy of the man, who, without shame or necessity, did proclaim his own turpitude, must be believed, because it is clearly proved. As to the woman, the fact rests on a solitary and very doubtful instance. The jury thought it so doubtful, that they could not pronounce either way. The judge *a quo* thought it his duty to pronounce the legitimacy. We are clear he ought not to have come to the opposite conclusion.

If the case of the woman alone was now before us, we might consider whether justice would not require a re-examination of it; but the children were most certainly innocent; they are possessed of a judgment which declares them legitimate, and we could not have declared them otherwise. If there be a defect of proof the fault is not theirs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

M'Caleb, for the plaintiff.

Cuvillier, for the defendants.

Dauphin *et al. v.* Soulié. III, N. S. 446.

Three-fourths of the creditors on the bilan, are necessary to a forced respite.

COURT of Probates of New Orleans.

MATHEWS, J., delivered the opinion of the court.

In this case the appellees proceeded against their creditors, for the purpose of obtaining a respite, which was accorded to them by a number of persons whose names were placed upon their bilan as creditors; and who appeared at the meeting, which took place according to the order of the court, before the notary public therein designated. The proceedings of the case were regularly homologated, without any opposition by the present appellant; whether he had been cited in the case is not shown by the record; in which, however, his name appears as a creditor, and also as appellant.

The case is brought up without statement of facts, or bill of exceptions, and errors are assigned as being apparent on the face of the record. The appellant's right of appeal is opposed by the counsel of the appellees, as not being a party to the suit, and not having appeared and made opposition to the homologation of the proceedings which were had before the notary. If he were not cited in the manner prescribed by law (and it is not shown that he was) he cannot, with propriety be considered as a party in the action. But it is clearly shown, that he was at the time of instituting proceedings against their creditors by the appellees, one of those creditors. In conformity then with the doctrine on appeals as established by *Partida* 3, 23, 4, he has a right to sustain his appeal; and we do not believe that this right ought to suffer any derogation, on account of no opposition having been made by him to the homologation of the proceedings.

The record shows clearly that no express consent to the respite asked by the appellees, was given by a majority of the creditors, equal to three-fourths in number and amount; if this number and amount be estimated according to the bilan, and not in pursuance of the number of those who actually appeared at the meeting, and swore to the credits. A respite is a privilege granted to a debtor, and always derogatory to the rights of creditors who are in a minority, by changing their contracts without consent on their part. Effect should not be given to it, unless obtained under strict observance of law. We are of opinion that to count absentees amongst the number of assenting creditors, would not be in conformity with the letter and spirit of our law which regulates respites.

[Dauphin *et al.* v. Soulié.]

The fair presumption is, that a creditor who does not appear at a meeting, intends to assent to no change or alteration of his rights, but means to hold to his original contract.

In this view of the subject, it is evident that in the present case, a legal majority of the creditors have not granted the respite. The judgment is, therefore, in relation to those who have not assented thereto, erroneous and void, as shown by matters apparent on record; and as it may whilst standing unreversed, injure the appellant,

It is ordered, adjudged and decreed, that as to him it be avoided, reversed and annulled, and that the appellees pay the costs of this appeal.

Seghers, for the plaintiffs.

Dennis, for the defendant.

Bushnell v. Brown's Heirs. III, N. S. 449.

THIRD District.

It is a point clearly settled by law, and many decisions, that a vendor of property, who is in danger of loss or eviction, by suit actually commenced, *questione mota*, ought not to be compelled to pay the price, unless good security be offered by the vendor to save him from injury.

How far the existence of a previous mortgage, pressing on the thing sold, would authorise the price to be withheld until security was given against its probable effects, is a matter, perhaps, not definitively fixed, either by express law, or a long course of decisions. But in the present case, the plaintiff offered to prove that suit had been commenced on the mortgage from which he feared injury. This we are of opinion he ought to have been allowed to do, as on the existence, or non-existence of such a fact, the judgment proper to be rendered in the cause, must vary.

Pratt *v.* Flower *et al.* III, N. S. 452.

(See 2 *Martin, N. S.* 333.)

FIRST District.

At the last trial of this case, the plaintiff made an objection to a witness set forth in a bill of exceptions; namely, that he was testifying to the contents of a written instrument, which was not produced, nor its non-production accounted for. The judge being of opinion that it was not sufficient to exclude the witness, admitted him to testify, to which the plaintiff excepted.

Of the soundness of the general principle on which the objection was made, there cannot be a doubt; and there is scarcely any of which we are called to make a more frequent application in the administration of justice. The only question, therefore, in this case, can be, whether there was sufficient evidence before the court to enable it to say, that the matters to which the parol testimony was offered, had been reduced to writing, To establish this fact, the plaintiff contends, that it appears from his own letters introduced in evidence against him by the defendants, a written receipt had been given to the witness at the time the payment of the money was made. In opposition to this, the defendants urge, that this statement made by the firm, of which the plaintiff is surviving partner, cannot be evidence for them or their representative; and that at all events it is not sufficiently strong to destroy the testimony of a disinterested witness.

Whether it should have that weight or not, is a question which could be only settled after the testimony was received, and therefore cannot assist us in determining whether it ought to be admitted. The legality is one thing, the effect another; and the latter is necessarily dependent on, and a consequence of the former.

It is a general principle of the law of evidence, that where either party in a suit relies on the admissions or confessions of his adversary, in order to make out a case against him, the whole of these admissions must be taken together. It is also the well established doctrine of the civil law, and its justice is most obvious. It is, however, true, that though the whole must be taken together, it does not follow the whole must be believed; for there may be coupled with the admission of a fact, matters so extraordinary in discharge of the obligation which it establishes, that no credulity can adopt it. Giving the defendant the full benefit of this exception to the rule, we are unable to find any thing in the evidence independent of the testimony of the witness objected to, which would authorise us to say, the proof afforded by the confessions of the plaintiff, in relation to a written receipt having been given to the agent at the time he made the payment, is untrue. It

derives great probability, too, from its being in conformity with the usual mode of doing business. Men rarely make payments on account of third parties, without taking written acknowledgments of the transaction. We think, therefore, the defendants, after offering proof that a written receipt had been given, could not introduce parol evidence in regard to the payment, without accounting for the receipt.

Bonne *et al.* v. Powers. III, N. S. 458.

The Spanish law did not require that all the formalities necessary to give effect to a will should appear on the face of it.

If a will be not void, but voidable, no one but the heir at law can take advantage of the defect.

A sale not signed by the vendor, cannot be the basis of the prescription of ten years.

In prescription, a *just title* is necessarily the basis of *good faith*.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The petitioners, as heirs of P. Bonne, deceased, claim from the defendant, a tract of land, situated in the parish of New Orleans, of twenty arpents front; which they allege he has taken possession of without any title.

The defendant pleads,

1. That the plaintiffs are not, as they style themselves, the natural children of P. Bonne.

2. That they are not free persons, being born from a woman slave at the time of their birth.

3. That they are not, as they state they are, testamentary heirs of P. Bonne.

4 That he has been in possession of the premises in question, for more than ten years, in virtue of a just title, and with good faith.

5. That the plaintiffs have received from their mother, the price of the property sued for.

6. That all and singular the allegations, contained in the petition, are untrue.

The court below decreed the land to the plaintiffs, but condemned them to pay the purchase-money, on the ground that they were heirs of their mother, from whom the defendant had bought.

The defendant appealed, and the plaintiffs have asked in this court that they be relieved against that part of the judgment which directs them to pay the original purchase-money to the appellant.

The first and second points made by appellant, have been abandoned on the argument. In support of the third, he has principally relied on alleged defects in the last will and testament of the plaintiffs' ancestor, by which they were instituted his heirs. The principal objection has been drawn from a rule of the Spanish law, which requires that in case the testator does not speak, nor understand the language of the notary, the public interpreter shall be called in; and in case there is no public interpreter in the place, some other person who understands the language shall be required to assist at the making of the will, and that such person shall be duly sworn to faithfully explain the declarations of the person desirous to make his will. *Febrero, p.* 1, *cap.* 1, *sect.* 28, *no.* 297.

It is said that it does not appear on the face of the testament, that the person who assisted as interpreter was a public officer of the government, or if he was not, that he was duly sworn according to law.

The will was made in the year 1799, before the change of government. The Spanish law did not require, as our Code does, it should appear on the face of the instrument itself, that all the formalities necessary to give effect to a will, previous to the signature of the testator and the witnesses, had been complied with. Proof of this could be received, when the testament was admitted to probate, and the execution ordered. This we are bound to presume was furnished, when the competent authority directed the will, under which the heirs claim, to be carried into effect. So long as this judgment remains unreversed, and the validity of the will unimpeached by the heirs at law, we apprehend that a third person who detains the property of the deceased has not a right to contest it. The rule of *res inter alios acta non nocet* does not apply to a case like this. The will is not introduced *per se* as binding on the rights of third parties, but as a fact in tracing title, as constituting a part of the muniments of an estate. If it were on the face of it absolutely null and void, it would then perhaps give rise to a different question, the party in possession might say, it could produce no effect, *hic tuus titulus, revera titulus non est.* What you offer does not, nor cannot transfer the right of your ancestor, and therefore you cannot claim from me, what belonged to him. But this will is not on the face of it null and void; it is merely voidable. It therefore does transfer the right of the ancestor, unless set aside and annulled, by those to whom the succession would have devolved, in case the testament had been made. Merlin's Rep. *de Juris. vol.* 8, *verbo Nullité*, 660, *sect.* 3; Breedlove & Bradford *v.* Turner, 9 *Martin*, 377; Barr *v.* Gratz, 4 Wheaton, 213, 220.

The next question to be decided, is presented by the plea of the defendant, that he has acquired a title to the premises by prescription. As thirty years have not elapsed since he entered into possession, it is

necessary for the validity of this pretension, that he should show a just title, and good faith. In support of the first, which is necessarily the basis of the latter, he presents a public act, which purports, that the testamentary executrix of the will under which the plaintiffs claim, and one Francisco de Rua, her atttorney in fact, had sold to the defendant the premises now in dispute, as part of the succession of the ancestor of the petitioner. To this title the plaintiffs have objected, and we think correctly, that the instrument not being signed by the executrix, nor by any person for her, it is null, and cannot be a just title, on which to base prescription.

The last point is disposed of by that just decided. The act is no better evidence of the receipt of the purchase-money, than it is of the sale. One of the heirs, Rosette, having discontinued since the commencement of this action, judgment must be rendered in favor of those who have persisted in their claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be reversed, avoided and annulled, and, proceeding to give such judgment here, as in our opinion ought to have been given in the court below, it is ordered and decreed, that the plaintiffs Jean Baptiste, Jacques, Charles, Manuel, and Adelaide, do recover of the defendant, five-sixths of the premises claimed in the petition, with costs in both courts.

Morel, for the plaintiffs.

Dennis, for the defendant.

Plauche *v.* Plauche. III, N. S. 463.

COURT of Probates of New Orleans.

The curator should be adjudged ten per cent. per annum on the revenue produced by the estate of the heir while under his management.

Fougard *v.* Tourregaud. III, N. S. 464.

Certificate of notary under the act of 1821, is not evidence unless the forms prescribed by statute have been strictly pursued.

But if received without objection it is legal evidence.

If a paper be evidence of one fact, and not of another, it will be presumed to have been read, to prove that which could be legally established by it.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The defendant is sued as endorser of a promissory note. He pleads want of notice of protest; that the note had been secured by a mortgage on property, which the plaintiff in this suit had permitted to be sold on an execution against her; and that as she had, by her own act, deprived herself of the power to make a cession of the right accessary to the note, she cannot recover from the defendant.

On the trial, the plaintiff offered as evidence of notice of the protest, a declaration of a notary public, made in pursuance to an act of the legislature of the state, approved the 14th of February, 1821, entitled "An act concerning protests of bills of exchange and promissory notes, and notices to be given to drawers and endorsers." The defendant did not object to its introduction, till after the evidence was gone through; but called on the judge to charge the jury, that the declaration was not legal evidence of notice, as it had not been drawn up in the form prescribed by law. The judge refused to direct the jury as prayed for, and the defendant excepted to his opinion.

This act of the legislature makes a great innovation on the rules of evidence. It renders men responsible to any amount, on the mere declaration of others, and waives the solemnity of an oath in regard to facts which are matters *en pais*. Such a law cannot receive too rigid a construction, and he, who claims the benefit of it, should bring himself within its letter.

That principle we should not fail to apply to this case, had the proceedings in the court below enabled us to do so. But as has been already stated, the certificate or declaration of the notary, was received in evidence without opposition, and once permitted to go to the jury there could be no further question in regard to its legality; the only thing to be examined was its effect: whether, in other words, it was sufficient to satisfy the minds of the jury of the truth of the facts therein stated, and of that, they, and not the court, were the judges. Whether the statement was worthy of credit, did not depend on the form in which it was written, though the legality of admitting

it as evidence did. Highlander *v.* Fluke, 5 *Martin*, 459; Babineau *v.* Cormier, 1 *Martin*, 456; Pannell *v.* Coe, *Ibid.* 614; M'Neely *v.* M'Neely, *Ibid.* 646.

The defendant, however, insists, that without contesting the correctness of this rule, he does not come within its operation, because the paper offered here was evidence of the protest, as well as evidence of the notice of that protest: that he could not have objected to it as proof of the former, and that consequently no assent can be presumed on his part, that it should be received as evidence of the latter, it being a well established principle in this court, that when a paper is introduced, which is legal proof of one fact, and not of another, it can never be assumed it was read to establish any thing which by law could not be proved by it. Breedlove *et al. v.* Turner, 9 *Martin*, 380.

This exception is certainly correct, but the application of it is not well founded. The protest was proved by the original instrument of protest. The introduction of the copy, with the declaration of the notary, that he had given due notice to the endorsers, cannot be presumed to have been for the purpose of establishing that the note had been protested. Unless we supposed the plaintiff wished to prove one fact twice, and not to prove another, equally as essential to his right of recovery.

We are unable to perceive any weight in the second ground of defence, taken by the defendant. He was a party to the suit, in which the slave he now claims a cession of, was sold. The proceeds of that sale have been applied to his credit, for had not the price been deducted, he would have been responsible for the whole amount of the note.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Morel, for the plaintiff.

Barbin, for the defendant.

Dutillet *v.* Dutillet's Syndics. III, N. S. 468.

The act of 1813, in that part which requires the registry of marriage contracts theretofore passed, to be recorded within a year from the passage of the act, &c. &c. is not unconstitutional as regards the constitution of the United States.

PARISH Court of New Orleans.

[Dutillet v. Dutillet's Syndics.]

MARTIN, J., delivered the opinion of the court.

The only question presented to us is the constitutionality of that part of the act of 1813, chap. 14, 1 *Martin's Digest*, 700, which requires marriage contracts heretofore passed, to be recorded within a year from the passage of the act, and declares, that such marriage contracts, as may not be recorded accordingly, shall thereafter have no effect, except between the parties thereto.

It is urged, the Civil Code has provided that "the law disposes, for the future only; it cannot have any retrospective effect;" Civil Code, 4, art. 7; that the constitution of the state, and that of the United States, inhibit the passage of *ex post facto* laws and of laws impairing the obligation of contracts.

We have not examined whether the act of 1813 be in opposition to the Code; because if it be, it abrogates it, *leges posteriores, priores contrarias abrogant.*

It is settled by the highest judicial authority in these states that the expression, *ex post facto* laws, in the constitution of the United States, must be understood as confined to criminal cases, 3 Dallas, 386, and we think that its technical meaning is the one, in which the expression is used in the constitution of this state.

So, the question reduces itself to the inquiry whether the provision be void, as impairing the obligations of a contract.

On this point we cannot be aided by decisions of the British courts, and very little more by those of the French.

The power of the legislator over every article of property, in action or possession, and to make private rights yield to public exigencies is admitted; and, he who seeks to enforce his rights by law must submit to the regulations established by the legislator for the general welfare.

Every civilised country has seen fit to establish some law prescribing a limited time, within which rights should be asserted. This law the civilians justly call *Patrona humani generis.* In this country, various terms are fixed, from one, to thirty years. This time does not impair the obligations of contracts, although it destroys the legality of such obligations, reducing them from legal and moral obligations to mere moral obligations. Public tranquillity requires that latent claims should not spring up, at distant times to destroy the tranquillity of individuals; that every creditor should disclose his demand in due time.

In the present case, the legislator has considered that there were in this state many latent or tacit mortgages, which greatly obstructed the commerce or mutation of property; that these concealed claims were often a snare to the unwary. They, therefore, ordered, that in future, they should not exist; but, that the creditors of them should publicly announce them to the world by registering in an office to which easy access could be had. The standing claims could not be submitted to any regulation antecedent, but time was given for the holders of them to proclaim them to the world, and the obligation

was imposed on them to register them. But as a law is ineffectual without a sanction, it was provided that the party, who should, in violation, conceal his claim by refusing or neglecting to record it, should not have any benefit of it, to the injury of third persons, of those who were not parties to the contract, in which such claim originated.

This appears to us a provision of the nature of an act of limitation, one which, according to our jurisprudence, does not impair the obligation of a contract.

If A has promised to B to pay him a sum of money, by a promissory note, a late law of this state says A must sue, assert his claim against B, within a limited time or he will be barred; theretofore the time was thirty years, it is now reduced to six, and the law will operate six years after its promulgation, on notes executed long before it. Is not this adding and imposing a new condition, which was not thought of by the parties, at the time of the contract? Surely it is; but it operates, it is said, on the remedy alone, the legal remedy. Take away the legal remedy from the legal and moral obligation of a contract, it is reduced, impaired to a mere moral obligation; and this is right, because the legislature has thought public exigency demanded it. Now in the present case, the legislature, reviewing the evils resulting from certain claims being suffered to be concealed, has required not that they should be asserted by suits, within a limited time, but they should be recorded. This we consider the legitimate exercise of legitimate power. They had a right to compel holders of such claims to exhibit them to the public. They had also a right to compel obedience to their command, and a denial of any remedy against persons not parties to the contract, was the means they resorted to. They viewed it within the scope of their constitutional power.

If it clearly appeared to this tribunal that the constitutional barriers had been overleaped, it would become our duty, and we hope, we would have the firmness, to say so. We would lament the necessity of differing in opinion with the legislature of the state, but its opinion could not stand between our consciences and our God. We would respect it, but we would deliver our own. On the most mature reflection, we conclude it is our duty to give our aid to the execution of the law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

De Armas, for the plaintiff.

Dennis, for the defendant.

Bradford's Curator *v.* Beauchamp. III, N. S. 473.

THIRD District.

A curator may demand the succession of his intestate's son, who died in his father's lifetime: the right of intestate was vested by law and required only to be exercised by the apprehension or possession of the property of the estate; it required no formal acceptance. If it did, the succession is accepted by the present suit.

The validity of a will, which has not been presented to the judge of probates, will not be inquired into in the district court.

Till such a will has been so presented, it cannot authorise prescription.

Faurie *et al. v.* Millaudon *et al.* III, N. S. 476.

The directors of a bank, even after the expiration of its charter, are not suable by any number of stockholders to answer particular charges of fraud or mismanagement in damages.

THIRD District.

MARTIN, J., delivered the opinion of the court.

The plaintiffs, stockholders of the Planters' Bank, allege that the defendants, whom they had appointed directors of said bank, have so mismanaged its concerns, in violation of their duty, and its charter, that the plaintiffs have not only been deprived of any dividend or profit, but their shares have become of very little or no value. Facts of positive fraud and collusion, by which an immense loss has accrued, are stated. It is further alleged, that the defendants, after the expiration of their time of service as directors, continued themselves, without authority, in the management of the funds of the bank; that by this misconduct and the inability of the bank to pay its notes, the charter has been forfeited and the corporation dissolved. The petition

concludes that the petitioners may be respectively awarded the price of their respective shares, with damages.

The general issue was pleaded; the defendants' liability or accountability to the plaintiffs, and the dissolution of the corporation, were denied.

The district court was of opinion that "the charter of the bank is still in force, and until it expires or be declared void by a competent authority, no action can be maintained by any member of it against another." The petition was accordingly dismissed.

At the hearing we stopped the counsel of the defendants, being clearly of opinion that the action is not maintainable.

The district judge was certainly correct, the case being as he stated it, that of a corporation still in existence.

The counsel for the defendants, however, urges, that in the argument, which is to be as on a demurrer, the dissolution of the corporation being averred, must be assumed.

Taking it so, the parties stand exactly in the situation of members of a firm, whose partnership has expired.

In such a case nothing is more clear, than that the acting partners are not accountable to the others, much less to a number of them, even the majority or more, for any particular transaction, singly, nor any number of transactions, but only for that balance, which after a settlement of accounts, shall appear due; and that the account ought to be rendered in presence of all the partners, who must be made defendants, if they are unwilling to be plaintiffs.

We held, in the western district, that a partner has no action against another, except to make him account until a final settlement takes place, and then for the balance that appears due. Drumgoole *v.* Gardner *et al.*, 10 *Martin*, 435. And since, that a partner has no right to be paid, until all claims against the partnership are discharged. Ward *v.* Brandt *et al.*, 11 *Martin*, 333. In Ozeas *v.* Johnson, C. J. Tilghman of Pennsylvania, set aside a verdict (which he considered correct on the merits) obtained by a partner against another, on the sole ground that there was no proof that the parties had settled the accounts of the partnership, and that all, that either partner is entitled to, is his share of what ought to remain after the partnership debts are paid. 1 Binney, 193; Smith *v.* Barron, 2 D. & E. 478.

Admitting, therefore, that all that is alleged is true, the defendants are accountable for the loss their fraud or ill conduct has occasioned to the stockholders; but the sum they thus owe is part of the common fund, which is not to be divided till the debts of the partnership are paid, and a balance struck.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Livermore and *Eustis*, for the plaintiffs.

Wagaman and *Grymes*, for the defendants.

Exnicios *v.* Weiss. III, N. S. 480.

SECOND District.

The attestation of a parish judge is legal, although he subscribes himself A B judge, and not A B parish judge.

The vendee is not disturbed by the recovery of the land by an adverse claimant in a suit, in which the former was not a party.

An injunction will not be dissolved although originally improperly granted, if it appear that a subsequent event will require it to issue, if dissolved.

EASTERN DISTRICT, APRIL TERM, 1825.

Johnson *et al.* *v.* Sterling. III, N. S. 483.

THIRD District.

If debts be assigned as collateral security, by public act, the assignee is not obliged to use the same diligence as the endorsee of negotiable paper.

An agreement that the *expenses* of collection shall be borne by the assignor, does not authorise the assignee to charge a fee for his own trouble.

The case of Flower *v.* M'Micken was one, in which the plaintiff undertook to use all the *necessary steps* for the collection of the debt *without delay; here* there was no such stipulation, the debts were assigned as collateral security and plaintiffs might collect them at any time since the assignment.

For the calculation of interest, the principle is quoted from Hynson *v.* Madden *et al.*, 1 *N. S.* 571.

Aubert *v.* Buhler *et al.* III, N. S. 489.

A twelve months' bond is not void if taken for more than the property sold for.
Sheriff may amend his return after a contest, in which its validity is attacked.
A sheriff may return a writ of execution after the return day.
Purchasers at sheriffs' sales cannot be affected by irregularities which occur after the sale.
If a levy be made before the return day, a sale may be made after.

THIRD District.

PORTER, J., delivered the opinion of the court.

This case originated in an application for an injunction, and the grounds on which it is prayed for, are stated in the petition to be: That on an execution issued in favor of the heirs of Davenport *v.* Charles Cousinard and others, one of the defendants in that suit became the purchaser of a slave named Phillis, for the sum of 599 dollars and 87 cents, for which he gave his bond to the sheriff, at twelve months, for 600 dollars, and the present plaintiff became surety thereto. That the writ under which this property was sold, was returnable on the 19th day of April, 1823, and the sale took place on the 21st of that month. That the writ was not returned into the office of the clerk of the court out of which it issued until the 19th of April, 1824, nor the bond until the 20th of August of the same year. That the principal in the obligation has property enough to satisfy the same; and that the plaintiff is ready to furnish money to have the discussion of said property carried into effect. By reason of all which premises it is prayed that the bond may be declared null and void; that the defendants may pay damages for illegally proceeding to seize the plaintiff's property, and that an injunction may issue restraining them from all further proceedings, until the final judgment of the court in the cause.

The defendants pleaded the general issue. The court, on hearing, dissolved the injunction, and the plaintiff appealed.

The following grounds have been relied on in this court, to obtain a reversal of the decision of that of the first instance.

1. The twelve months' bond is taken for a greater amount than the debt, interest and costs, and therefore, illegal.

2. That as the sheriff did not pass the sale, and take the bond until after the return day of the *fieri facias* had been out, and the writ expired, the bond was null and void.

3. That the bond has not the force of a judgment, (even supposing it in other respects valid,) it not having been returned with the execution, as the law requires.

4. Property specially mortgaged, should be first discussed.

And lastly, that the court below erred in permitting the sheriff to amend the defect in his return.

I. In support of the first position it has been contended, that a bond of this description can only be valid, by virtue of the statute which creates it, and that the act does not authorise the sheriff to take a bond for more than the debt and interest. Acts of 1817, sect. 14 and 15, p. 36.

The objection is neither supported by law, nor by the facts as proved in evidence. Were the allegations in the petition true, the obligation would still have been good for the sum, for which the property was really sold. A mere clerical error of the kind would not avoid it. 9 Cranch, 28; 5 *Martin*, 193. It appears, however, there was in truth no error in the bond, the mistake arose from the sheriff's returning he had sold the property for twelve and a half cents less than the sum for which it was adjudged. It was objected in the court below, and the objection has been renewed here, that the district court erred in permitting the sheriff to amend his return, after a contest had arisen in which the regularity of his proceedings was collaterally involved. We think, however, the court acted legally, in permitting the error to be corrected. If the amendment was in conformity to the truth of the case, it would have been a great hardship on the plaintiff in execution, to have made him suffer from the mistake of the officer. If false the sheriff is liable to an action, for these alterations are made at his peril. The following cases will show how liberal the courts of our sister states are, in allowing amendments of this kind; in some of the instances we refer to, the indulgence was extended further than that which was accorded here. 1 Johnson's Cases, 31; 5 Johnson, 89; 9 *Ibid.* 384; 3 Caines, 98; 1 Cowen's Rep. 413; 11 Mass. Rep. 413, 477; 1 Taunton, 322.

II. The second ground on which the appellant relies, has been sustained on the 15th section of the act of 1817, as it is commonly called; by which it is provided, the sheriff shall make return, on or before the return day. The letter of the law it is said must be pursued, and the bond is null and void, because the directions of the statute have not been strictly pursued. Acts of 1817, 36, sect. 15, Civil Code, 4, 13.

The provisions of the act referred to, in relation to the period within which sheriffs should return writs of execution, were made for the benefit of the plaintiff, and to remedy an evil sensibly felt previous to the passage of the law, of these officers holding back writs, and failing to pay over the money made on them. The construction contended for, would increase, rather than diminish the evil intended to be remedied. It would create a greater delay than that which arose out of the earlier provisions on this subject, deprive the plaintiff entirely of the benefit of his execution, and force him to take out a new one. Nor would the evil cease here; it would be still more disastrous to the defendant; for, if the writ were null and void by not

being returned on the day fixed by law, it would then follow the money might be made a second time on the alias writ of execution. A principle, the adoption of which would bring with it such strange consequences, cannot receive the sanction of this court. And even admitting the doctrine to be as contended for, between plaintiff and defendant, we are clear, that as the purchaser cannot be affected by any irregularities of the officer in relation to the writ, which may occur subsequent to the sale of the property; he has no right to set these irregularities up as a defence against paying the purchase-money. All that concerns him is, that the proceedings previous to the sale have been legal, and that he obtain a conveyance in due form of law. Whether, say the Supreme Court of the United States, in a case very similar to this, the marshal makes a correct return, or any return at all to the writ, is immaterial to the purchaser. 4 Wheaton, 506.

The same reasoning applies to the objection raised, on the ground that the bond was not returned into the office at the time directed by the act of the general assembly; it is a question with which the plaintiff in this suit has nothing to do.

The only part of the objection contained in the second ground presented by the plaintiff, which requires an attentive consideration, is that which objects to a want of title, from the return day of the writ having expired, at the time the sale was made by the sheriff. The facts, on which this objection rests, do not appear very clearly from the record, for neither in the return of the sheriff, nor in the deed of conveyance, is it stated on what day the adjudication took place. We are left to presume it from the date of the bond, which the law requires to be taken at twelve months, with interest from the day of sale. This we have concluded, though not without some hesitation, is sufficient to authorise us to examine the correctness of the objection relied on.

The ancient laws of the country can afford us little aid in settling this question; the form of the writ under the Spanish practice, and mode of executing it, being so entirely different from that introduced by the act establishing our courts, and regulating their proceedings,

It is a well established principle in that country from whose jurisprudence we have taken the name, and with some slight alterations the form of our writ of *fieri facias*, that if a levy be made under a writ of execution before the return day, the sheriff may proceed to sell afterwards. It has been objected, that as our laws contain no provision for issuing a writ similar to that of *venditioni exponas*, such an extension cannot be given to the writ of *fieri facias* here.

But the authority to sell under that writ after the return day, as practised in our sister states, is founded on considerations totally distinct from the existence of other process. That of *venditioni exponas* generally goes when the *fieri facias* has been returned; and the case in which it is most frequently used is, where the officer returns that the goods seized by him remain unsold for want of buyers. If,

however, he can make a sale under the first writ, though the return day should have expired; the authorities are most express he may do so. Public convenience is much in favor of a similar rule being adopted here, and we see nothing in the statute that forbids it. The provision which directs the writs to be returned on or before the return day, was made, as has been already shown, for the benefit of the plaintiff, and if he choose to waive it, and permit the sheriff to proceed and finish with what he has commenced, the other parties cannot object. If a contrary doctrine were recognised, it would in its operation delay the plaintiff, and expose the defendant to additional costs. The case of Crocket *v.* Watkins, was quite different from the present; there the sheriff advertised the property at periods other than those fixed by law. 4 *Martin*, 540; 2 Dunlap's Practice, 800; 2 Tidd's Practice, 934; 2 Caines, 243; 4 Wheaton, 506.

III. IV. The third point has been disposed of by the opinion expressed on the second; the fourth, which requires discussion of the principal's property is opposed to a positive provision of our Code. Judicial sureties have no right to claim it. 434, art. 29.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Christy, for the plaintiff.

Preston, for the defendants.

Gurlie *et al. v.* Coquet. III, N. S. 498.

An appeal lies from the order of a court ordering a writ of seizure and sale. The plaintiff cannot proceed at once by the *via executiva* and *via ordinaria*.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit is founded on several promissory notes made in negotiable form, and is instituted by the endorsers against the maker. The plaintiffs claim also, as a security for the sum due by the said notes, the benefit of a mortgage given on certain lots, houses, and negroes, as set forth in their petition; alleging that it was executed by the defendant, in relation to the contract, which gave rise to the negotiable notes above stated. The petition commences in ordinary form, and sets out in general terms the causes of complaint on the part of

the plaintiffs, and concludes with a prayer for process and judgment in the usual manner; and also an additional prayer for an order of seizure and sale of the mortgaged property; which was granted by the judge *a quo*. The defendant on appearing, moved the court to set aside the order of seizure, and filed his answer, by which he excepts to the form of the action and pleads the general issue. On hearing, the motion to annul the order of seizure and sale was overruled, and the defendants appealed.

The appellees contend that the appeal must be dismissed,

1. Because no appeal lies from an order of the judge below given *in limine litis*.

2. Because the decree of the district court by which the defendant's motion to annul the order of seizure was overruled, is not signed.

3. Because the first two points made by the appellant before this court, were not made in the court below.

The first ground assumed by the counsel for the plaintiffs, on which he claims a dismissal of the appeal, contains in it the question, whether an appeal lies directly from an order of seizure and sale issued by any of the inferior courts of the state? This question has been already settled in the case of Tilghman *v.* Dias, 12 *Martin*, 691; an order of seizure is there expressly recognised as a judgment; and that such a decree is final in its nature cannot be doubted. It is also evident that if erroneously made, it might do an irreparable injury to the party against whom it may be pronounced.

Considering this appeal as taken directly from the order of seizure which was signed, we deem it unnecessary to examine the appellant's second ground, for a dismissal, which rests solely on the want of signature to the order by which the defendant's rule to show cause, &c. was discharged.

If the reasons urged on us to dismiss the appeal, based on the ground of the defendant's not having expressly alleged in the court below, the points, by him relied on in this court, have any great weight or importance in themselves, in relation to fairness and correctness in judicial proceedings, that weight is, in our opinion balanced by the plea found in the answer, being an exception to the manner and form of the suit.

Admitting, therefore, the appellant's right to maintain his appeal, it becomes our duty to inquire into the correctness and legality of the proceedings of the court below. The object of the appeal is a reversal of the order of seizure and sale. The reasons for which this reversal is claimed, are set forth in the appellant's points filed in the cause, which are four in number: but being of opinion that he ought to prevail on the first two, we will examine these only. First, he alleges that the seizure and sale were improperly ordered, because the plaintiffs chose to sue; and were obliged to sue by the *via ordinaria*. Secondly, because both modes of proceeding, by ordinary suit and order of seizure and sale, cannot be maintained at the same time.

The summary judicial proceeding in our courts by seizure and

sale, granted in the first instance, in *limine litis*, on authentic instruments, having the force of a judgment, known to the Spanish jurisprudence by the denomination of *juicio executivo*, is derived to us solely from that jurisprudence, and must, therefore, be entirely under the government of rules to be found in those laws of Spain which were, and are still, binding on the inhabitants of this state. So little have our legislature interfered with this mode of proceeding, that it seems yet to depend exclusively on the ancient laws of the country; to these, therefore, we must resort for the proper solution of any question which may arise in the administration of justice in this mode. According to the doctrine taught by these laws, *the juicio executivo* is an extraordinary judicial remedy; and, on pleading legal exceptions, is easily changed into the *via* or *juicio ordinario*, unless the executive way be pursued *stricto jure*. The same facility appears not to be allowed in changing the pursuit from the ordinary to the extraordinary and summary judgment. The authorities cited and relied on by the appellant's counsel, it is believed, support his pretensions.

It appears that doubts are entertained, whether a suitor could, before having commenced his action in the *via ordinaria*, abandon his pursuit in that way on paying costs, and resort to the *via executiva;* but the opinion seems to prevail, that a creditor, who had the choice of either mode of proceeding, and has chosen the ordinary, cannot, after the *contestatio litis*, abandon that and pursue the extraordinary remedy, without the acquiescence of the debtor. In the present case, an attempt is made to combine the two actions, ordinary and extraordinary; and the order of seizure seems to have been granted before the answer was filed, previous to which, perhaps, the plaintiffs would have been at liberty to dismiss or abandon their suit in common form, and pursue the *via executiva*. But they pertinaciously held to both, until the *contestatio litis;* and cannot now change the ordinary action into the *juicio executivo*, without the consent of the defendant.

It is difficult to imagine any thing that would be more absurd in judicial proceedings, than to allow both ways to be pursued at the same time. The object of a suit by petition and citation, in the ordinary mode prescribed by our laws, is to obtain judgment; whilst a resort to the extraordinary way, by immediate order of seizure and sale, must be supported by something which has the force and effect of a judgment.

The manner of proceeding attempted by the plaintiffs, is not an attempt to cumulate different causes of action into one suit, but to pursue one cause of action, by claiming the benefit of two remedies for a single wrong, which appears to us to be unjust, oppressive, contrary to reason, and of course contrary to law. We are therefore of opinion that the plaintiffs ought not to be allowed to proceed on their order of seizure, but must be confined to their ordinary suit, since they have failed to dismiss it before the *contestatio litis*. This

opinion is based on the supposition that the *via executiva* might have been legally pursued by them, yet that is a question not decided by us, because its decision is not necessary in our present judgment. See the authorities cited by the defendant's counsel, *Curia Phil. via executiva, no.* 1 and 2, and *Febrero, p.* 2, *b.* 3, *cap.* 2, *no.* 113 and 115, and *no.* 72 of *cap.* 1, *same book.* Although there is some apparent contradiction in these authorities, we believe a just interpretation of them supports the decree about to be pronounced.

It is, therefore, ordered, adjudged and decreed, that the order of seizure and sale in this case, granted by the judge *a quo*, be avoided, reversed and annulled, and that the cause be remanded to the district court, to be proceeded in, according to the ordinary and legal course of actions instituted in the usual form; it is further ordered, that the appellees pay the costs of this appeal and all costs occasioned by said order of seizure.

Seghers, for the plaintiffs.

Dennis, for the defendant.

Young *v.* Gilly. III, N. S. 504.

Three-fourths of the creditors who are placed on the bilan, must assent to the respite, in order to bind the absent creditors.

FIRST District.

PORTER, J., delivered the opinion of the court.

The defendant is sued as surviving partner of the house of James Pryor & Co. The justice of the claim is not disputed, but it is objected to the plaintiff's recovering, that the defendant has obtained a respite from his creditors of one, two, and three years.

The district court gave judgment in favor of the petitioner for the amount claimed, with interest from judicial demand and costs of suit, but directed the execution to be suspended, until the respite should have expired. The plaintiff appealed.

The record in the case of the defendant against his creditors, praying for this respite, does not come up, but there is among the documents filed, the following agreement signed by the counsel in this cause.

The original petition was filed on the 19th of May, 1824.

The petition did not contain the name of a single creditor. A stay

of proceedings was ordered the same day, and the creditors ordered to meet on the 23d of June.

On the 19th of June, a supplemental petition was filed, containing the names of the creditors, and a statement of the amount due to each.

The amount of debts due by Gilly was 31,860 dollars, 73 cents, and due to eighty-eight different persons.

The creditors who met, were sixteen in number, and the amount of their debts, as stated in the schedule, is only 4908 dollars, 3 cents. It appears from the original petition, the plaintiff prayed to be permitted to file a supplementary petition and schedule, which were afterwards filed.

Our Code declares that the forced respite takes place when all the creditors do not agree, for then the opinion of three-fourths in number and amount, binds the rest. Civil Code, 438, art. 3.

In this case the creditors were eighty-eight; and the debts above 31,000 dollars. Those who acceded to the respite were sixteen, whose whole claims did not reach 5000 dollars. So there was not three-fourths in number and amount, nor in either.

We presume the court below, in holding this respite to be binding on the plaintiff, must have proceeded on the idea that none could be considered creditors, but they who were present, and proved on oath the justice of their claims. This question was brought before us a few days since in the case of Soulie *v.* Dauphin, *ante*, 124; we gave it then a good deal of attention, and an application for a rehearing, has required us to consider it again. In support of the application it is urged, our Code provides "that the creditors called on should take an oath before the notary, in whose office the meeting takes place, of the amount and truth, of their respective claims; that the creditors who have not taken this oath, cannot be reckoned in the number of those who possess three-fourths of the debts;" hence those who are absent cannot count any way. If present, and in favor of a respite, the vote could not be received, because it was not sworn to. If absent it can have no effect against the debtor. Civil Code, 439, arts. 4 and 5.

This argument assumes, that all who fail to attend are not creditors, a conclusion which the premises by no means warrant. The clause in the Code was evidently intended as an additional protection to the creditor who was absent, or in the minority; and not to weaken the right which the previous provision had conferred on him. The third article says, that in order to bind those who refuse to consent, three-fourths of the creditors, in number and amount, must agree to the respite. The fifth provides, that creditors who have not taken an oath of the truth of their demands, cannot be considered as making a part of those who possess three-fourths of the debts. That is, as we understand the law, that it is not sufficient three-fourths of those on the schedule assent, but it must also appear, that those so placed there, and who have agreed, are *bona fide* creditors; and this to prevent,

and defeat collusion. The position that three-fourths of those who attend, although not, perhaps, one-tenth of the number placed on the bilan, are three-fourths of the whole, necessarily implies the original schedule was false. This the party praying for relief cannot be permitted to aver, though the creditors refusing the respite might. It therefore appears to us to be reasoning wide from the spirit, and meaning of the law, to say, that, because a creditor who does not prove his debt, cannot give his assent to a respite, he who is really one is obliged to pursue the same formality, to enable him to object the irregularity of proceedings, by which the exercise of his legal rights is affected. Such a doctrine would oblige creditors, who felt unwilling to grant the delay prayed for, to attend the meeting, prove their debts, and formally refuse to accede to the prayer of the petitioner. Far from their being obliged to do so, we think they may, if they choose, remain silent, and let their debtor, if he can, obtain the assent of the majority which the law requires. This assent must be express, and cannot be implied. If none of the creditors met, the respite could not be accorded. If a fewer number than three-fourths meet, it is the same thing as if none presented themselves, for that proportion of the whole is required, to enable the debtor to obtain the forced respite.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant, the sum of 742 dollars, 58 cents, with interest from judicial demand, and costs in both courts.

Whittelsey, for the plaintiff.

M'Caleb, for the defendant.

Giraudel v. Mendiburne. III, N. S. 509.

The lading of goods may be proved by parol, if it does not appear there was a bill of lading.

A party ought not to be allowed to prove what was not alleged.

PARISH Court of New Orleans.

The Court said:—The defendant's objection, in the third bill is, that

the plaintiff ought not to have been permitted to show he landed goods of the defendant at Tabasco, because he had not alleged it.

We think the parish judge erred in permitting the question to be asked.

But we are of opinion the fact thus attempted to be proved, was an immaterial one; because the plaintiff had not alleged it, and had alleged another, which dispensed him with the proof, that he unloaded any goods at Tabasco, viz. that the defendant did alter the voyage, viz. one from New Orleans to Campeachy and Tabasco, to one to Campeachy and Cysale.

The defendant, when the verdict was pronounced, did not pray, as he might, to have it set aside, as given on illegal evidence. This would not prejudice him in this court, if the evidence appeared to us material; but while we feel it our duty to remand, when we apprehend a material fact has been permitted to be proved contrary to law we think ourselves bound not to put the party in possession of a verdict, to the unnecessary vexation and expense of a new trial, when the fact complained of as improperly proved, is of no importance. Bowman *v.* Flower, 2 *N. S.*, 273.

The question of fact appears to us to have been correctly solved by the jury.

Damages for the frivolous appeal are asked; but while we admit that the plaintiff has introduced illegal evidence, we cannot mulct the defendant in damages, for having sought a relief, which we think we ought not give him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Waggaman, for the plaintiff.

Canon, for the defendant.

Brooking *v.* Wade. III, N. S. 513.

THIRD District.

Case remanded by reason of verdict plainly contrary to evidence.

Ireland *v.* Bryan *et al.* III, N. S. 515.

THIRD District.

Service at the last place of residence in this state, is not of course at his usual place: already decided in Baldwin *v.* Martin *et al.*, 1 *N. S.* 519.

Oldham *v.* Croghan. III, N. S. 517.

Held, a synallagmatic agreement may be given in evidence, though not executed in duplicate.

FIRST District.

When the cause was on trial, the plaintiff offered in support of the allegations contained in his petition, an agreement between him and the defendant Croghan. The introduction of this document was objected to, on the ground that it had not been executed in duplicate. This objection was sustained by the court; upon which the plaintiff offered the deposition of a witness, to show that the defendant had executed the agreement The testimony was opposed, because it was proving a parol contract, when plaintiff had declared upon a written agreement; of this opinion also was the judge, and the plaintiff suffered a nonsuit, and appealed.

We think the judge erred. The objection made, seems to us to have mistaken entirely the nature of the proof offered; it was not as defendant stated, to prove a parol contract where a written one was declared on; but it was to prove a written one had been executed, and the same declared on in the pleadings. On recurring to the petition to ascertain whether this evidence would have differed from the allegations therein contained, we find that instead of presenting any variance, it is in strict conformity with them. The petition states, that a written agreement had been entered into, containing a stipulation, that the plaintiff should hire the defendant certain slaves; that in

pursuance thereof he did deliver them; that the defendant received them; that they worked on his plantation a year; and that he paid a considerable part of the hire. The bill of exceptions declares, that the deposition was offered to show the defendant had executed his agreement; which is the very allegation in the petition, for we are at a loss to conceive in what other manner he could have executed it, than by receiving the property, and paying the money agreed on for the hire.

We also think the judge erred in refusing to let the paper be read, although it was not executed in duplicate. Our Code does not declare that acts under private signature, which contain synallagmatic agreements, are null, unless there be as many originals as there are parties; it states they shall not be valid. The proof of their not being void results from another provision, which declares that if executed afterwards, they have effect as if made double. Although, therefore, they have not the effect of making proof of every thing contained in them, as they would have, the moment their execution was established, if made in as many originals as there were parties; they are still good as commencement of proof in writing. The obligation contained in them exists, and if it can be legally proved in any other way, its execution must be enforced; according to the maxim of all laws, and one on which we have so often acted, *ut res magis valeat quam pereat.* 12 *Martin*, 713; 6 *Toullier, Droit Civil Français, vol.* 6, *lib.* 3, *tit.* 3, *cap.* 2, *nos.* 22, 23; *Ibid. vol.* 8, *cap.* 5, *nos.* 320, 322.

We think, therefore, that the instrument offered in the court below, as it was a writing signed by the defendant, and had emanated from him, might on general principles be used in evidence against him. And the question recurs whether there was any thing contained in the petition in this case, which deprived the plaintiff of the right of using it. The objection that has been made on this ground, supposes a degree of technicality in our proceedings, which our laws do not sanction. The statute merely requires a plaintiff to state his cause of action with the necessary circumstances of places, and dates. The best rule to insure a compliance with this provision is, to relate the case, as it has occurred, without running into unnecessary prolixity. This has been done, and we do not think the petition need have set out in what manner the writing was to have its effect; as a commencement of proof in writing, or as made double. Had it been executed in the latter form, and suit brought on it, there would have been as much reason for objecting to the petition, because it did not state that the instrument was obligatory, in consequence of having been so made, as there is in the present case, because it is not alleged that it has effect as a commencement of proof in writing. And yet, in the case first put, it is hard to believe such an exception would have been thought of. It is sufficient to apprise the adversary of the facts on which a claim is set up against him. The legal consequences resulting from them, may be shown on the trial. The plaintiff appears to have related his case as it occurred, and we would greatly regret if a

suitor in our tribunals could be turned out of court, and mulcted in costs, because he did not do something more.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the cause be remanded, with directions to the district judge to admit the agreement offered by plaintiff as a commencement of proof in writing, and also to permit him to prove it was executed in part by the defendant, and that the appellee pay the costs of this appeal.

Strawbridge, for the plaintiff.

Pierce, for the defendant.

Prentice *et al.* v. Waters. III, N. S. 522.

On the death of the defendant, and the appointment of a curator to his estate, the plaintiff may demand the removal of the case to the court of probates.

FIRST District.

MARTIN, J., delivered the opinion of the court.

After issue joined, the defendant died, and his wife took letters of curatrixship on his estate, and the plaintiffs, on a suggestion of these facts, prayed for the transfer of the cause to the court of probates, which was accordingly ordered. The defendant afterwards prayed for, and obtained the rescission of the order of transfer, whereupon the plaintiffs appealed.

The legislature having given exclusive jurisdiction to the court of probates, of all claims against vacant estates, it follows, the jurisdiction of other courts is thereby taken away, and that all suits pending in such other courts, must be cumulated to the *mortuaria* in the court of probates, which granted the letters of curatorship; for otherwise the will of the legislature cannot take effect.

It is urged that the plaintiffs may dismiss their suit, and institute it anew in the court of probates. This may be true; but the plaintiffs may, by doing so, lose many an advantage. Possibly prescription may have attached, the nature of the pleadings may have given him some legal and just advantage, which he may lose by dismissing his suit; he must at all events pay costs.

It is true, the legislature has pointed out no mode of transferring

the record; but in taking away the jurisdiction of one court, and vesting it in the other, the last has been virtually possessed of the means of exercising its jurisdiction, and that must be by the record being sent to it. *Cum quid conceditur, conceditur et id per quod pervenitur ad illud.*

It is, therefore, ordered, adjudged and decreed, that the order of the district court, rescinding the order of transfer, be annulled, avoided and reversed, and the order of transfer reinstated, and the case remanded to the district court, to be transferred to the court of probates, and the costs be paid by the appellee.

Whittelsey, for the plaintiffs.

Hennen, for the defendant.

Henry *v.* Cuvillier. III, N. S. 524.

Either party who discovers, during the trial, that one of the jury on the first trial has been sworn, may demand that another be substituted to him, and the denial of this is a good cause to demand a new trial.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

It appears by the record that this cause was tried before a jury in the month of January, 1824, and that a new trial was granted at the request of the defendant, which took place in December, of the same year. The defendant being again dissatisfied with the verdict of the jury, moved in the court for another trial, which being refused, and judgment rendered on said verdict, he took the present appeal.

As a basis of the motion for a new trial in the last instance, in addition to the ordinary and formal grounds, of the verdict being contrary to law and evidence, two more are found. 1: That one of the jurors who tried the cause in the last trial had served on the jury, which rendered the first verdict. 2: That the jury, disregarding the charge of the judge *a quo*, in relation to the defendant's legal right to claim a credit against the plantiff's demand for money advanced, by him, to her, previous to the commencement of the present action, returned a verdict contrary to that charge.

We will examine these last two grounds. Being of opinion that either of them singly, is sufficient to support the appellant's motion;

it would be useless to enter into a discussion of more than the first, except that, we are led to believe from observations made during the argument of the cause, that it may be settled between the parties without further expense and trouble of litigation; under a knowledge of our opinion in relation to the second.

The facts as they are stated on the record in regard to the first ground assumed by the defendant to sustain his motion, show, that the juror was sworn before he discovered him to be one of those who decided on his cause in the first instance; that when he discovered it, he moved the court to discharge the jury and order a *venire de novo;* and that this was refused by the judge, who thought that his objection came too late after the juror had been sworn, but ought to have been used as a cause of challenge before the oath was administered. It is most clearly a good and substantial exception to a juror, on the trial of the same cause a second time, that he acted as such on a former trial; and jurors must be, *omni exceptione majores.* 3 Black. Com. 363. The exception attempted to be taken to the juror in the present case, is known to the common law of England, (from which we have adopted most of our principles on the subject of trials *per pais,*) under the denomination of a challenge to the polls: it is a principal challenge *propter affectum,* wherein the cause assigned, carries with it, *prima facie,* evident marks of suspicion, either of malice or favor. It is true, that the most proper time to make a challenge of this kind, is before the juror be sworn; and if a party with a full knowledge of the existence of such exception, were to suffer one to try his cause, without recusation to the rendition of a verdict, perhaps he ought not to be relieved against negligence so gross, after having taken the chance of obtaining a decision in his favor. But in the case now under consideration, it appears that at the moment when the juror was sworn, the appellant did not perceive that he was one of those who acted in the former trial. So soon as he made the discovery, he applied to the judge to have the evil of which he complained, remedied, by a discharge of the present jury, and *venire de novo.* This we think ought to have been done, or another juror substituted, free from exception; on this ground, therefore, our opinion is, that the defendant is entitled to have a new trial.

The claim of deduction, from the amount recognised by the verdict, as due on the contract of partnership between the defendant and the late husband of the plaintiff, for sums of money advanced to her since his death and previous to the institution of this suit, we think, as did the judge *a quo,* ought to have been allowed by the jury, in strict pursuance of law. Payments were made to the mother, who by law was entitled to one half of the acquests and gains of a matrimonial community, at its dissolution, in consideration of a proposed agreement to pay to her daughter a certain sum at a period fixed by the project of a contract, offered by the defendant; a kind of annuity or *rente viagere* which never had effect. They were made in error

and might be recovered back, or ought to be allowed in compensation or payment. The circumstance of her assuming the character of tutrix in the present action, ought not to be allowed to operate against the legal rights of the appellant. Conventional interest can only be legally claimed under an express agreement in writing. The record furnishes no evidence of such an agreement in the present case. Legal interest on the amount due after deduction of advances or payments to the creditor, is that alone which can be allowed, and only from the judicial demand.

In this view of the case, we might proceed to give final judgment, if the evidence of record showed clearly the amount paid to the appellee, directly, and that paid by her order or request to other persons, under the agreement of counsel, to waive the right to a new trial by jury; as was proposed in the course of the argument. But these facts are not established with sufficient perspicuity.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered that the cause be remanded to the court below to be tried *de novo*, and that the appellee pay the costs of this appeal.

Cannon, for the plaintiff.

Cuvillier, for the defendant.

Villars *v.* Morgan. III, N. S. 529.

If a person who advances the price of a slave, take the bill of sale in his own name for his security, he cannot be disturbed by the creditors for the person for whom the purchase was made till he be reimbursed.

PARISH Court of New Orleans.

MARTIN, J., delivered the opinion of the court.

The defendant, sheriff of the parish, having levied an execution on a slave, as the property of Jacob, the defendant in the execution, the present plaintiff procured an injunction to stay the sale; the plaintiff in the execution intervened; the injunction was sustained till the intervening party pay the present plaintiff 600 dollars.

The intervening party appealed.

The record shows that in the answer of the appellee to the appellant's interrogatories, the following facts were disclosed:

The appellee bought the slave with the intention of delivering him to Jacob, as soon as the latter repaid whatever the former became obliged to pay for the slave. It was agreed, that on the latter's inability to repay, the slave should be sold at auction, and the latter should only have a claim for so much of the price as remained after the former was fully repaid. Accordingly the bill of sale was made to the former, who gave his own note for the price.

Jacob paid the first note of the plaintiff, and two hundred and eighty dollars of the second; the balance, six hundred dollars, was paid with money borrowed by the plaintiff on his own responsibility.

1. The appellant urges the appellee is not the owner of the slave.
2. If he has any right, it is only against Jacob.
3. If the court be not of this opinion, then the appellee ought to be decreed to pay the appellant the 280 dollars paid by Jacob.

We think the parish court did not err. The sale is not an absolute one, as it appears on the face to be; but the appellee has candidly disclosed its character. The appellee's object was, to have the best security he could for the money he might advance. He took a bill of sale which he agreed to cancel on his receiving his disbursements, if Jacob could repay them; and promised, if he could not, to sell the slave at auction, and after reimbursing himself, pay Jacob the balance.

This was a very fair agreement, as Jacob could not disturb the appellee, otherwise than by compelling him to sell; the creditors of the former can do no more. They have no right to compel the appellee to submit to a sale in the present case, so as to burthen him with the payment of the costs of the suit brought by the appellant against Jacob, and thus postpone his right to be paid his advance.

If the appellant wishes to have the slave sold on his execution, he must do that which his debtor would be bound to do, before he could have, or sell the slave; reimburse the appellee the six hundred dollars he has paid to the vendor of the slave.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Rousseau, for the plaintiff.

Derbigny, for the defendant.

EASTERN DISTRICT, MAY TERM, 1825.

Caulker *v.* Banks. III, N. S. 532.

Powers conferred by the terms it *shall be lawful* need not *necessarily* be exercised. Acts of Legislative Council, 1804, p. 6; 1805, p. 256.

PARISH Court of New Orleans.

Among other positions which were assumed in argument, it was contended: the authority to send a cause to referees could not be exercised in cases where either party prayed for a jury, because it would be depriving the citizen of the right to the latter mode of trial. Whether there be any thing in the constitution of this state, which prevents the legislature from directing a particular class of cases to be tried by the court with the assistance of referees, is a point which will be examined when a case arises, where it will be necessary to do so, to settle the rights of the parties before us.

Plaintiff having introduced a witness to show the manner in which defendant transacted the partnership of Caulker & Banks: on the cross-examination defendant craved to introduce and put into witness's hands the book in which the original entries were made in the store of Mr. Banks, at the several periods therein stated, and whether any of them were in witness's hand—this for the purpose of rebutting charges of a serious nature which would be fixed, by witness's answers, upon him. He contended that it was within the latitude allowed on cross-examination, to show the incorrectness of the witness's statement, by producing a book, the inspection of which

would have established the accounts to have been kept in a different manner from that stated by him.

It is difficult to meet this argument fairly, and give it a satisfactory answer. The defendant had most certainly the right to test the credibility of the witness in the mode which the question implies, and considering the matter in the light in which it was presented in the court below, we think the interrogatory should have been permitted to have been put to the witness. But other considerations mingle with the inquiry here. Supposing the court erred, it does not necessarily follow the cause should be sent back for a new trial. A presumption at least should be raised, that in consequence of the error, the decision on the merits was different from what it would otherwise have been.

This presumption has not been raised here. As correctly observed by the court below, the testimony could not have made the book evidence; it was therefore only legal to shake the witness's credit. Now for the latter purpose it was rendered wholly unimportant by a subsequent agreement. This agreement was entered into after the cause had been six weeks under investigation before the jury, and by it the parties agreed to submit the case to eight jurors sworn; upon the testimony already taken and the documents on file; and further, that the jury might send for this witness, and examine him on any point. We cannot believe, after such an agreement, reliance was intended to be placed on the want of credit in the witness's veracity, or that the verdict of the jury was in the least affected by the refusal of the court in an early stage of the cause, to permit him to state whether entries in a book presented to him, were in his handwriting. 2 Caines, 129; 1 Johns. Cases, 259.

We now come to the last and most important of the exceptions presented, and that is, to the correctness of the decision of the judge *a quo*, in refusing a new trial. The principal grounds on which it was demanded, were, that all the evidence submitted had not been taken into consideration by the jury, and that the testimony which they had heard in their retirement had not been reduced to writing.

These reasons for a new trial show how unusual and irregular a course this cause took in the court below. To understand them, it is necessary to state, that after the investigation had continued for the period already mentioned, the parties came to the following agreement and affixed their signatures to it.

"We now agree to submit this cause to the eight jurors sworn on the testimony already taken, the books and accounts and all other written testimony on file. The jury, for further information on any point, may, if they please, send for Henry Hutton, Peter M'Alpine, and Joachim Kuhn, but no other witnesses, and they shall attend only if and when, the jury require it. It is agreed that Mr. Caulker furnish the jury the extract of the letters of Thomas Banks, marked A, and his remarks B, not as evidence, but for the sake of reference to the original letters and accounts to which he objects."

Two of the counsel for the defendant prove that, independent of the stipulations herein contained, it was also agreed on by the parties and the jury were so informed, that all evidence received by them in their retirement, was to be taken down in writing.

An objection was made to the reading of the affidavits of the counsel, on the ground that they were excluded by an act of the legislature, which positively prohibits them giving testimony in any cause.

The contemporaneous exposition of this statute was, that by its provisions, counsel were placed under the same disability as the parties in the suit. The practice in this court, and others, has been to permit them to swear to matters connected with the proceedings previous to trial, and subsequent to it; to get a continuance or to lay the grounds for a new trial. This interpretation of the law has now for the first time been seriously attacked, but after giving much attention to the argument, we are satisfied of the soundness of the construction, originally given to the statute. The words *giving testimony in a suit*, cannot, in fairness, be extended beyond the meaning attached to the general provision, that a party shall not testify in his own cause. A knowledge of the facts indispensable to enable the court to conduct the trial legally, is frequently confined to the attorneys. It cannot be presumed it was the intention of the legislature to exclude the only means through which these facts could be known, and without which the proceedings could not be carried on according to law.

In addition to their evidence it is proved by a witness to whose competency no objection has been made, and whose testimony stands uncontradicted, that the counsel for both parties told the jury on retiring; that the depositions which they might take from the witnesses in their room should be taken in writing by questions and answers; that he gave evidence there, and that it was not reduced to writing.

We consider it, therefore, as established beyond doubt, that it made a part of the condition on which the jury was to hear evidence out of the presence of the court, that it should be reduced to writing. Every presumption belonging to the case fortifies this proof. By the agreement the parties did not renounce the appeal. It cannot therefore be believed, they did not intend to secure the means of giving effect to a right which they reserved.

This state of things offers a difficulty, which, after turning the matter in every way that it has presented itself to our minds, cannot be got over. The laws of this state have secured to suitors in our courts the right to have their case examined here on the merits. That right can only be forfeited by neglect, or illegality in the mode of bringing the case up; it cannot be lost by accident over which the party had no control, and in relation to which no misconduct can be attributed to him. Such we take to be the general rule, and one, of the utility and correctness of which, a reasonable doubt cannot exist. We have already acted on it in the case of Porter *v.* Dugat. There the parties agreed the judge might make out the statement after judgment. He

lost his notes, and the appellant moved this court to remand the cause for a new trial, in order that the facts might be legally and regularly brought before it. The application was resisted, on the ground that it was not the fault of the appellee, the cause did not come regularly up, that the consent he gave was for the convenience of his adversary, and every presumption was in favor of the verdict. The court said it was not the fault of the plaintiff, the district judge mislaid his notes; he ought not to suffer from an accident over which he had no control. 9 *Martin*, 92.

That case was stronger than this, for there perhaps the appellant was not free from fault; as after a verdict against him, it was his interest alone, and of course his duty, to have the case regularly brought up. Here when the agreement was entered into, the verdict was not rendered; it was of course uncertain; and being so, it was equally important to both, to secure the means of guarding against the errors into which the jury might fall.

These means have failed. Without either fault or misconduct of the appellant he is deprived of a right, which the law has secured him, of having his case examined here. Under such circumstances this court cannot pronounce definitively on his cause. Every precedent we have heretofore established; every principle which it is important to preserve, in relation to the practice in our courts, forbid it. We might be doing the defendant a dreadful injustice in doing so. We can only delay the plaintiff by adopting the other course.

It is due to the argument at bar, to notice the principal reasons offered against the conclusion just expressed.

First, it was contended, the jury were not compelled to take down the evidence, and consequently, it must be presumed the parties intended running the risk of their not doing so.

Admitting the jury were not compelled to take down the evidence, we are of opinion that if they were informed when the cause was surrendered to them, they were to reduce to writing any further evidence they might hear, it was their duty to state whether they intended to comply with this injunction or not. And that if the appellant, misled by their silence, suffered the examination of the testimony to be withdrawn from the presence of the court and confided to the jury in the confidence they would follow the instructions received, his case is as strong a one for relief, as if it had been their duty to record the evidence. For he loses his right to appeal without any fault on his part.

Next, it was urged, the evidence even if taken down, could not have been a legal statement of facts, without the subsequent consent of the parties; and this being known at the time, the appellant must be presumed to have left the cause to the jury, subject to this contingency.

We are of opinion that if the jury had taken down this testimony, the consent of the parties to their doing so, would have made it such a statement as this court might have acted on. We are unable to distinguish this from evidence taken under commission, or facts agreed on, before, or at the trial.

Lastly, and most seriously, it was urged, that as soon as the plaintiff discovered the jury had failed to take down the evidence, he offered to receive the depositions of the witnesses, as to what they might have testified in the jury room; and those of the jurors, in relation to every thing which had been proved to them after they left the presence of the court.

This offer was not made until one month and five days after the verdict had been rendered, and it cannot be concealed, that such a mode of getting the evidence was liable to strong objections. For after the space of time just mentioned, how could any one be certain to give from memory the very same evidence which was delivered to the jury? Under such circumstances, and believing, as we do, that the failure of the jury to take down the evidence, gave the appellant the legal right to have a new trial; we are unable to say this right was forfeited, by refusing an offer, made as a substitute for that relief, which the law would afford.

Strong appeals to our feelings have been made on behalf of the plaintiff. The hardship which he sustains by being compelled to leave his family and home to pursue the defendant here: the ruinous consequences to him, from the delay of a second investigation of accounts, which, on the first trial, took the unprecedented time of six weeks before the jury could understand them: and the injustice of suffering the defendant to profit by the embarrassment created by his gross negligence, and want of good faith, have been placed before us in the most striking light. These appeals have not been without their influence, for they derive too much support from all the facts which appear on record; and we regret that the opinion we entertain of the law of the case, prevents us from putting an end to it. Nothing gives the court more satisfaction than to be enabled to make its judgments meet the justice, as well as the law of each particular case. But it must ere this have appeared clear to every one who has attended to the course of decisions in this tribunal, that on all those occasions, where the doing of equity would have violated a general and important rule, we have uniformly refused to sacrifice the rule, to the case. This is our situation here. The appellant invokes his right to be heard before this tribunal, and says he has been deprived of it without fault on his part. We cannot turn a deaf ear to this complaint, unless we violate a principle, which it is of the first importance to suitors in our courts to maintain: and nothing will reconcile the plaintiff so soon to this judgment which now compels him to go again before the parish court, as the reflection; how valuable the rule we obey would be to him, had the jury found a verdict against him, and by failing to take down the evidence, deprived him of the means of getting his cause re-examined here on the merits.

Various other questions have been made which the opinion just expressed renders unnecessary to examine, and it is therefore ordered, adjudged and decreed, that the judgment of the parish court be avoid-

ed and reversed, and that the case be remanded for a new trial, the appellee paying costs of this appeal.

Mazureau, Preston and *Carleton*, for the plaintiff.

Grymes, Morse and *Maybin*, for the defendant.

Marigny *v.* Johnston's Syndics. III, N. S. 551.

PARISH Court of New Orleans.

It is no objection to the reading of a notarial act that it is written in French. See Tilghman *v.* Dias, 12 *Martin*, 649.

A suit to be put on the tableau according to rank and privilege, is not a suit for the *payment* of any sum of money, on which the act of 1813, 2 *Martin's Digest*, 196, requires an amicable demand.

Fisk *et al. v.* Offit *et al.* III, N. S. 553.

If a commission merchant send an account current, in which a balance appears due from him, which he afterwards pays, he will not be allowed to recover it back on the ground that he sold his correspondent's cotton for a bill of exchange on New York, which has since returned protested, if he did not before disclose this circumstance: especially if the correspondent consigned the cotton for a third party, to whom he has paid the proceeds.

The right of factors to sell on credit and in what manner: principal ought to receive due information of the manner of sale, &c.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

The matter in dispute between the parties, is the price of twenty-nine bales of cotton, which were sold by the appellees as factors or

agents, for and on account of the appellants. The sale as shown by the evidence of the case, was made on credit, and a bill taken on New York, at sixty days sight. The bill was drawn by one Smith, the purchaser, on a firm of which he was a partner, for 2085 dollars and 70 cents, in favor of the plaintiffs, who discounted it and gave credit to the defendants in account, for the net proceeds: it was protested for non-payment in consequence of the failure of the payees. The drawer it appears also became insolvent; and in the adjustment of his estate, the plaintiffs obtained 1000 dollars, on account of said bill, having appeared in the *concurso* as creditors of the insolvent in their own right, and leaving a loss of 1397 dollars and 10 cents, including charges to be borne by one or other of the parties.

The principal grounds of opposition to a recovery relied on by the counsel for the defendants, are: 1. That factors or agents are not authorised by the usages of commerce in the city of New Orleans to sell for their employers on credit, and cannot legally do so unless special authority be given to that effect. 2. Admitting that the plaintiffs are justified by the usages of trade to sell the property of the constituents on credit; yet, in the present instance they have been guilty of misconduct, such as ought, in justice to place the loss on them, because they are chargeable with gross negligence in not giving information to the defendants in a reasonable time, of the manner in which they had disposed of the cotton now in dispute; by which negligence they have suffered in paying over the amount of the sum to Brashears, the real owner. 3. By assuming the character of creditors on the bill of exchange and transacting with the insolvents, they have made the affair their own.

In relation to the first ground of defence, considered in the light of a general principle, usage, or custom of trade; we are of opinion that factors may sell on ordinary credit, by sales made in good faith, and to individuals of good standing at the time of sale; and that they would not be responsible for losses occasioned by a subsequent failure of such purchasers, if they act with sufficient diligence in giving notice to their employers of the manner in which they may have executed their agency. Whether this authority, allowed by custom, to factors to sell on credit, would, under any circumstance, authorise them to take bills of exchange on distant places as evidence of the debt to their principals, and thereby subject the latter to losses which may arise, from negligence in presenting them, charges of damages on protests, &c., is a question worthy of consideration, and one which we think must be answered in the negative; unless full information be given to constituents of the manner in which their business has been transacted, and that in reasonable time for them to direct the mode in which they may choose to have bills thus drawn, negotiated on their account. The right therefore legally assumed by factors and commission merchants to sell on credit, does not authorise them to sell for bills in such a manner as to subject the owners of the property to any loss which may be occasioned by mismanagement, in

their collection, or to damages on protest, unless the persons for whose use they may have been received by their agents have full notice of the proceeding. The conclusion to which we have arrived on this point of the cause, would exonerate the defendants from all charges made on the bill in controversy on account of protest, &c., and reduce it to a simple obligation to pay the balance after deducting the sum obtained from the estate of the drawer, with interest from the judicial demand; because they had not notice of the manner in which payment for their property was secured. Nothing on the record shows that they received any information from the plaintiffs on the subject of this bill, until after its protest for non-payment.

The second ground of defence assumed by the appellants is based on the negligence of the appellees, in not giving notice that the sale which they had effected was on credit, but, on the contrary, by an exhibition of their account, it appears that the principals were credited with the price as a cash sale on the 3d of June, 1822, which led them into error, in paying over or crediting the amount of the price to the real owner from whom they had received the cotton as agents.

It is true, as contended for by the counsel, for the appellees, that this latter fact was not disclosed to them when the cotton was consigned. The case must be considered as if the property was really that of the consignors; and the circumstances of its being owned by another person, and of the intermediate agents having credited him with the price, can only be viewed as proof of the necessity, obligation, and consequent duty imposed on factors to give speedy, certain, and explicit advice to their employers of the manner in which they have conducted the business of the latter.

It is, most clearly, the duty of every person who undertakes to manage the affairs of another, to give due notice to his constituent, of the situation in which they are placed by his agency; more especially it is the duty of those who propose themselves to the whole community, as general agents or factors, to exhibit, in addition to adequate capacity, a ceaseless care of things entrusted to their management, both as to the manner in which they may be conducted, and in advising owners, of the real dispositions, made of their property. This we believe may be laid down as a general principle, resulting from legal doctrine on agency; but its application, in administering justice, is not without difficulty.

What effect negligence ought to have on the interest of agents in each individual case, must be decided in a great degree on its own peculiar circumstances. In that now under consideration, the plaintiffs sold the property of the defendants, on credit; they took a bill on New York for the price, in their own favor; they obtained money on that bill; credited the defendants for the net proceeds in their account with them, and did not give explicit information to the latter of these proceedings.

The consequence of this negligence was that the appellants credited the real owner with the price, which to them, if not lost forever, is

at least put out of their power and immediate control. Let us admit then that factors and commission merchants in New Orleans may sell the property of their principals on a reasonable credit; that they may sell it for bills of exchange such as are usual in the commercial transactions of the place. Still we are of opinion, that when this is done, the principal ought to receive due information of the manner of sale, and that an account of sales rendered without stating that it was on credit, ought, in the ordinary course of business, to be considered as a sale for cash. It is highly important that the owner of property should know whether his agent has sold it for prompt payment or on credit; it is equally important that he should know the nature of the security by which the price may be secured, whether by bill or note. He has a right to direct the manner in which such instruments as belonging to him shall be negotiated, whether with, or without recourse on failure of payment by the original promissors. In the present case the defendants were, by the conduct of the plaintiffs precluded from the exercise of any of these rights; for they had no notice of the manner in which their property had been sold, or of the nature of the security of its price.

They have received the net proceeds according to the account current made evidence in the case. The action is in the nature of one to recover money paid through mistake or on an unjust cause. We are of opinion, that the conduct of the plaintiffs has been such, in the management of this affair, as not to authorise a judgment in their favor. Having arrived at this conclusion on an examination of the appellants' first two points, it is unnecessary to discuss the third and last. See 3 Campbell's Reports, 291; and Paley on Agency, 27, 5, 37, and 45.

In opposition to the doctrine contained in the case cited from Campbell, the counsel for the appellees has referred us to a case lately decided in one of the courts of the state of New York: it is one, according to the newspaper report, in which a factor had sold property of his principal on credit, to the amount of 187 dollars. The sale was made to persons in good credit at the time, and a note taken for the amount: the debtors failed before it became due; and previous thereto, a settlement of accounts had taken place between the principal and agent, and the latter gave his note for the balance of account payable to the former at a time subsequent to that on which the note given by the purchasers of the property would be due. The principal had negotiated the factor's note, which the latter paid at maturity, and brought his action to recover the amount lost by the bankruptcy of the purchasers. It seems from the statement of the case that the purchasers' names had not been disclosed in the account of sales, &c. It does not appear whether the fact of the property having been sold on credit, was made known to the owner, but from the circumstance of the factor's note being made payable at a period subsequent to that on which the purchaser's note became due, it is presumed it was understood between the parties that the agent was not in possession

of the funds of his principal arising from the sales of the property. In other words he knew that it had been sold on credit. In the present case it does not appear that the defendants knew or were informed that the property had been sold on credit. They were kept in total ignorance of the manner of the sale until both drawers and payees of the bill became bankrupts. The affair had the appearance of one finally settled in the account current, as if the sale had been made for cash.

We are of opinion that the plaintiffs by their conduct made the bill their own, and must as such bear the loss occasioned by it. Whatever weight may be allowed to the newspaper case, it is not so similar to that under consideration, as to be a guide in our judgment. We believe the principles recognised in the case cited from Campbell to be sound, and applicable to the present.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that judgment be rendered for the defendants and appellants, with costs in both courts.

Eustis and *Strawbridge*, for the plaintiffs.

M'Caleb, for the defendants.

Kenner *et al. v.* Duncan's Executors. III, N. S. 563.

COURT of Probates of New Orleans.

If judgment be rendered in a suit where *three* are parties, *two* of them cannot have the judgment reversed in another action.

Executors cannot safely pay a mortgage creditor until his claims be settled contradictorily with the other creditors.

If the representative of an estate fail to settle it, the regular course is to compel them to file a tableau of distribution. And if they fail to comply with an order to that effect, they will render themselves liable in their private capacity. Civil Code, 178, 137.

M'Intosh *v.* Forstal *et al.* III, N. S. 571.

FIRST District.

Decision of the jury prevails, unless clearly erroneous.

Bryan *v.* Cox. III, N. S. 574.

Surety on an appeal bond, is answerable, though execution has not issued or demand made of the principal.

Whether the penalty of a bond can be demanded before the defendant is *en demeure*, *Quære?*

FIRST District.

PORTER, J., delivered the opinion of the court.

The question presented in this case is, whether the surety on an appeal bond be liable where no execution has been issued, or demand made of the principal.

The negative has been supported on the following grounds.

The bond is a penal one. The penalty is forfeited only when the obligor is in delay, *en demeure.* The debtor is not in delay until judicial demand. The condition of this bond was, that the defendant only became responsible on his principal failing to perform the judgment rendered against him, or satisfying the execution which might issue thereon. Pothier on Obligations, 144, 350; Civil Code, 284, 130.

This obligation being a judicial one, the defendant has no right to claim discussion. He is subject to the same responsibility, as the principal.

Now, in a suit against the principal, it appears to us, that if the defence were performance of the judgment, proof of that defence would be required from the defendant. The plaintiff could not be called on to prove a negative. The possession of the bond would be as strong proof of his right to bring action on it, as that of a note or bill of exchange would be, to call on the maker for payment.

[Bryan v. Cox.]

The authorities referred to, as to the necessity of putting the defendant *en demeure* by a judicial demand, have no application to this case. This is not an action to exact the penalty; if it were, perhaps the defendant might insist, that until he was put in delay, it could not be exacted from him. This petition merely requires the defendant to comply with the agreement, to enforce which the penalty was annexed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Maybin, for the plaintiff.

Strawbridge, for the defendant.

Morgan *v.* Mitchell. III, N. S. 576.

FOURTH District.

It is not a good defence against the claim of a sheriff for fees of office, that he has not resided within the state during the time the services were rendered.

Where one charges the other with a culpable breach of duty, he is bound to prove it, though it involve a negative.

If slaves be committed as felons and runaways, an acquittal of them as felons, does not authorise a discharge of them as runaways.

It is not a good defence that the slaves were not kept in close custody.

If a sheriff fail to advertise runaway slaves, he cannot recover his legal fees, but he may recover the value of his services, if the owner knew of their confinement and refused to take them out.

Crocker *v.* Nuley *et al.* III, N. S. 583.

THIRD District.

Defendants claim title, under a memorandum running, "I do sell, &c." signed by plaintiff, not signed by defendant. This was a sale *sous seing privé* of the premises: there is price, thing and consent; vendee's consent may be given afterwards and be proved *aliunde*. In this case he had it recorded, he entered into possession and his heirs paid the price. See 1 *N. S.*, 217.

Ritchie *v.* Wilson. III, N. S. 585.

Damages for an injury cannot be claimed in reconvention, one year after its infliction.

FOURTH District.

PORTER, J., delivered the opinion of the court.

The defendant and appellant moves to remand this case for a new trial.

The action is instituted on a promissory note, given to the plaintiff for his wages, as overseer on the plantation of the defendant in the year 1822.

The answer contains the general issue, and a plea, that the defendant was not bound to pay the note, because the plaintiff while acting in the capacity of overseer, did in violation of his duty, and by improper and cruel treatment to a negro girl, the property of defendant, cause her to drown herself: whereby he has sustained loss to the amount of 1000 dollars.

To this answer an interrogatory was annexed, calling on the plaintiff to state on oath, whether the note was not given for his wages as overseer. The judge refused to direct it to be answered.

There is no allegation, that the defendant was ignorant of this fact when he gave his note. As it occurred before the settlement of

accounts, and execution of the instrument, there is a strong presumption he knew it then; and if he did, it raises a strong presumption against the justice of the defence, that he should have given his note for 628 dollars, to the plaintiff for his wages as overseer, when at the same time the plaintiff owed him 1000 dollars.

The judgment of the court below was correct. Answering the interrogatory, could not have been of any use to the defendant, for the claim set up was barred by prescription. The wrong complained of had been committed more than one year before filing the demand in reconvention. *Part.* 7, *tit.* 9, *law* 22; Doliole *v.* Morgan, 2 *N. S.*, 26; *Inst.* 4, 4, 1.

But as it is possible, the defendant did not acquire a knowledge of the injury until within twelve months preceding his putting in this plea, although he has not averred it, the judge decided legally, in reserving to him his right to enforce it in another action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Nicholls, for the plaintiff.

White, for the defendant.

Miller *v.* Hennen. III, N. S. 587.

PARISH Court of New Orleans.

A note made payable at the house of the maker, is demandable either at his dwelling, or his *office*.

Whitehurst *v.* Hickey *et al.* III, N. S. 589.

The absence of the reasons on which a judgment is grounded, is only a relative nullity.
A parish judge's certificate that a sheriff's bond has been executed, with the concurrence of the justices, is evidence that the sureties were approved by them.
The sureties are bound by it, although it be not recorded.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

This is a suit brought against the curator of the estate of the late F. Amelung, who was sheriff of the parish of East Baton Rouge, and against the sureties of the latter as sheriff aforesaid.

The petitioner claims remuneration for the loss and damage occasioned by the negligence and misconduct of the sheriff in the execution of judicial process, wherein the interest of the former was concerned. Judgment was rendered in the court below against the curator and in favor of the sureties, from which latter part of said judgment the plaintiff appealed.

The case has been held longer than usual under advisement by the court, in consequence of believing that it involved a very important question in relation to the jurisdiction of the district and probate courts of the state. The circumstance which led to this belief, is the appearance of a bill of exceptions on the part of the curator to the judgment rendered after the verdict of a jury to which the case had been submitted, on the ground of incompetence in the court.

This is in truth an exception to a final judgment which (as has been repeatedly decided,) cannot regularly be taken. In examining the record more minutely, we discover that the curator is no party to this appeal, either as appellant or appellee, and, therefore, no notice can be taken of his interest in the cause. It is to be considered only in relation to the sureties who are the appellees. In their answer to the petition, after pleading the general issue, they further allege that the sheriff's bond relied on by the plaintiff is illegal and void.

The case comes regularly before this court on several bills of exceptions taken to the opinions of the judge *a quo* given in the course of the trial below. 1. That by which he permitted the record of the suit carried on to judgment and issuing of execution, wherein the sheriff is charged with negligence and misconduct, to be given in evidence to the jury. 2. To that by which he rejected the copy of a bond, proved to have been subscribed by the defendants, as sureties for the sheriff. 3. To the opinion whereby he refused parol evi-

dence to prove that the parish judge did assemble the justices as required by law to approve the security offered by said sheriff.

As to the first of these exceptions we are of opinion that the judge did not err, in admitting the record in evidence. The ground, on which its admissibility was opposed, is alleged nullity in the judgment on account of no reasons being adduced in its support. Admitting that such nullity exists, it is only relative, and cannot be taken advantage of by the present defendants.

The opinion of the judge, as represented in the second bill of exceptions, we believe to be erroneous.

The truth and correctness of the copy of the bond offered in evidence, the real existence of the original at a former period, and its loss without fault of the plaintiff or by a fortuitous event, were amply proved on the trial of the cause in the court below, as shown by the record; and the judge seems not have rejected the evidence on account of any defect of proof in relation to the copy, but under an impression that the original itself was void and invalid, in consequence of defects in its execution. In testing this opinion, we are, therefore, compelled to enter into a discussion of the law which requires sheriffs to give bonds, and points out the manner in which they ought to be executed. The act of 1813 requires every sheriff in the state to give two bonds, one for the faithful discharge of his ministerial functions in the execution of judicial process, the other for collection of taxes. Both are ordered to be recorded in the offices of the clerks of the parish courts. 1 *Martin's Digest*, 696.

The bond now under consideration is alleged to have no binding force on the persons who have subscribed as sureties, as being defective in its execution, and void because not recorded, &c. The act above cited directs how sheriff's bonds are to be executed, and the security offered approved. *Ibid.* 698, art. 3.

The parish judge is bound to convene a court (as it is termed) to consist of himself and a majority of the justices of the peace of the parish, who are required to judge of the sufficiency of the sureties offered and to approve or reject, as in their opinion propriety and the general interest may dictate. This court is not by the law compelled to reduce to writing, or to make out any process verbal, of their proceedings. The justices of the peace appear to be called in aid of the parish judge, to assist in judging of the sufficiency or insufficiency of the security to be offered by the sheriff; but are not required to sign the bond if accepted by the court. A bond shown to have been rejected, would not be binding on the subscribers: the want of the justices' names to the instrument is, however, no evidence that the sureties have been adjudged insufficient and the bond rejected. A certificate of the parish judge, showing that bonds thus taken, have been executed with the concurrence of the justices of the peace, ought to be good evidence of approval of the sureties, and consequent validity of their obligations. The copy offered in evidence in the present case, purporting the original was signed, sealed and delivered,

in the presence of the parish judge and justices of the peace, who approved the security given by the sheriff, is sufficient, having the signature of the judge.

We are, therefore, of opinion that it is good and valid according to the strictest forms of law. It now only remains to consider whether this validity is affected by the want of recording, in relation to the obligors. All the solemnities required in the execution and recording of these bonds are instituted solely for the benefit of the obligees, viz., the public. A failure to comply with them may lessen public security, but certainly ought not to be so construed, as to exonerate sureties from obligations voluntarily contracted. It has been already decided by this court that promissors must remain bound in the manner which they may have thought fit to bind themselves, if the contract be not illegal.

In relation to the last bill of exceptions, we are inclined to think that oral testimony might have been properly received in corroboration of the fact declared by the parish judge in executing the bond, that the justices of the peace present, approved that which was done. But if the solemn declaration of the judge, in the instrument itself, be sufficient to establish its legal execution, additional testimony would be useless.

According to this view of the case the judgment of the district court must be reversed, and as the cause was tried before a jury, and legal testimony rejected, it appears to this court to be most consistent with its uniform practice to send it back for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, so far as it relates to the appellees, be avoided, reversed and annulled, and that the cause be remanded to the said court, to be tried *de novo* between the parties to this appeal, with instruction to admit in evidence the copy of the bond, &c.; and it is further ordered, that said appellees pay the costs of appeal.

Watts and *Lobdell*, for the plaintiff.

Duncan, for the defendants.

Millaudon *v.* Arnous *et al.* III, N. S. 597.

The holder of a note *must not agree to give time* to the maker or any prior endorser, so as to preclude him from suing him, and to suspend his remedy against him to the prejudice of the endorser. Chitty, 371.

An agreement by the endorser of a note, to receive in payment, pickets at a fixed price, on a distant day after protest and notice, liberates the endorser.

FOURTH District.

MARTIN, J., delivered the opinion of the court.

The defendants, sued as endorsers of a promissory note, pleaded the general issue, and that the plaintiff neglected to protest the note, and to give them notice of its not being paid, and did make arrangements and agreements with the maker, for the payment of it, whereby they were discharged. He had judgment and they appealed.

The record shows that the protest was read in evidence, and the notary deposed he gave notice to the defendants by a letter, which he put into the post office.

Bouton, a clerk of the plaintiff, deposed, that the plaintiff, having heard the defendant Pedron was at Vignaud's, in this city, sent the witness there, who was told by Vignaud that Pedron was out, but if the witness came about the note, he could tell him he heard Pedron say he would call and pay the plaintiff. This was in the course of 1823.

A letter from the plaintiff to the defendants, shows that he wrote to them, that with the view of facilitating the payment of the note to the maker, he had promised to purchase pickets from him, provided, they were delivered in March following; that he had waited in vain, and had declined purchasing pickets from other persons. He now demanded payment from the defendants.

Vignaud deposed the plaintiff told him he had settled with Blake (the maker) for the note, that Blake was to send pickets in payment, that witness, calling a second time to ascertain whether the note was really paid, was informed Blake had settled it, and was to send pickets.

It is clear that the maker of the note acquired from the plaintiff the right of paying it in pickets on a deferred day. Although the plaintiff cautiously promised to purchase pickets, the object of this agreement to purchase was to facilitate to the maker the payment of the note, and thus the plaintiff forewent the right of demanding money in payment of the note, till the deferred day, on which the pickets were to be delivered.

The facility thus yielded to the maker was an obstruction to the right of the payee the plaintiff's endorser; for the plaintiff could not have transferred, after this agreement, the absolute right of the note to his assignee; no, not even to the defendants, if they had tendered him the amount of the note, in order to prosecute the maker, for the note must have passed to the assignee or the defendants, *cum onere.* For the plaintiff had, when he made this agreement, the complete ownership of the note, and every bargain made with him, insured to the maker the proposed advantage in the payment of the note, not only against the plaintiff, but also against any person, who by the assignment or delivery of the note, with a blank endorsement, might succeed to his rights.

There is no obligation of active diligence, in the holder of a note, to sue the maker or any prior endorser, and he may forbear to sue, as long as he pleases; but he must not agree to give time, so as to preclude himself from suing him, and suspend his remedy against him to the prejudice of the endorser. Chitty, 371.

The holder of the note, who intends resorting against his endorser, must retain the faculty, on receiving his payment from the latter, to transfer him all his rights, absolutely unimpaired against the maker.

By doing an act which impairs this faculty the recourse against the endorser is forfeited and no circumstance can restore it without the endorser's concurrence.

Here, till the first of March following, by the agreement, of which plaintiff's letter contains the evidence, the right of suing the maker had been abandoned by the plaintiff, with the hope pickets would be provided according to the agreement; the plaintiff during that time could not call on his endorsers for payment, for if they could be obliged to pay him, it would follow they could oblige the maker to pay them; which would be inconsistent with the agreement, that he should have the facility of paying in pickets, on the first of March.

The plaintiff's letter implicitly recognises the obligation he had put himself under, to wait with the maker till the first of March. For he makes the neglect of the maker to comply with his promise, to deliver pickets on that day, the ground of his right to call on the defendants.

But the plaintiff, by entering into an obligation to give time to the maker, rendered him less active to pay, than he probably would have been, if he had continued liable to an immediate suit, and the plaintiff's right on the defendants, affected by the indulgence he granted to the maker, cannot be restored or revived by the neglect of the latter.

The plaintiff has relied on several cases, which we have attentively examined. That from 3 Campbell is the case of an accommodation note, which is there said to create an exception to the general rule. *Exceptio probat regulam.* That from 16 Johnson does not support him, the principle of that case being that passive indulgence does not discharge, but active does. Yet the plaintiff was actively indulgent. The case in 18 Johnson settles nothing; it is an *it seems* case, not

very strong. The case in Bosanquet and Puller establishes that receiving security does not discharge. If the holder be not bound to sue, if he may wait, surely there is no injury done, if he take security, if he strengthens his right. The endorser, that may pay him, may have the benefit of this. The case in 10 East, is the case of a bond, which in England, is not a negotiable instrument.

The case in Gilmer, a Virginia reporter, goes the whole length of the principle contended for in the plaintiff's case, but we have not been able to see the whole of it. The reports of that gentleman are not known to be in the state, and we have only what we suppose to be the marginal note of it, in a digested index.

The case is a solitary and an anomalous one. We are unable to judge of the weight it is entitled to; particular regulations in Virginia very likely support it, but we cannot take it as affording us a legitimate rule of conduct.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

Dumoulin, for the plaintiff.

White, for the defendants.

Johnson v. Brown. III, N. S. 601.

THIRD District.

A curator is according to law *functus officio* after the expiration of a year. Civil Code, 180. He must then render an account of what he has done, but cannot be compelled to do more under an expired authority. The court of probates has no jurisdiction of a subsequent suit against him.

De Armas *v.* Morgan. III, N. S. 604.

Property specially mortgaged, cannot be sold at the suit of a third party, unless it bring more than the amount for which it is mortgaged.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff states he was the last and highest bidder for the sum of twelve hundred dollars, of a lot of ground, on which there existed a previous special mortgage for 1250 dollars, at a sale made by the defendant, on a writ of *fieri facias*, under the 17th section of the act of assembly, entitled an act to amend the several acts, &c., approved the 28th January, 1817. That he expressed his readiness to comply with the conditions of the sale, viz. to be responsible to the first mortgagee for the said twelve hundred dollars, and required the defendant to put him in possession, and give him a title to the premises, &c., which he refused to do.

There was judgment for the former, and the latter appealed.

The statement of facts admits those stated in the petition.

The act provides that whenever any special mortgage exists on the property offered for sale on a writ of *fieri facias*, in favor of any other person than the plaintiff, in the *fieri facias*, it shall be sold subject to such special mortgage, to be paid by the purchaser, and the sheriff shall only receive from the latter, the surplus for which the said property shall have been sold, over and above the amount of such special mortgage, and shall apply the same to satisfy the *fieri facias*.

The defendant's counsel urges the judgment ought to be affirmed, because the sheriff cannot sell property especially mortgaged, to a third party, unless something be bidden, beyond the amount it is mortgaged for, and he refers us to Landreaux *v.* Hazzelton, 1 *N. S.*, 600.

The plaintiff's counsel insists that there was a sale, for the property seized was to be sold for what it would fetch. That a sheriff's sale cannot be avoided, on account of the inadequacy of the price, and he refers us to De Ende *v.* Moore, 2 *N. S.* 336.

The case relied on by the plaintiff's counsel establishes nothing, but the principle that the purchaser of property, at a probate sale acquires it free from incumbrance.

But it is of the essence of every sale, that there should be a price, received or to be received by the vendor; now, in the present case whether we consider the plaintiff in the *fieri facias*, or the sheriff as the vendor, there was no price received or to be received by either.

[De Armas v. Morgan.]

The mortgaged creditor cannot be considered as the vendor, nor the sheriff as his agent, for the sale was made without his participation, consent, or even knowledge; if the law interfered with his mortgage, it could only be after securing his payment, and the present sale compels him to be satisfied, if it has any effect with a part of his claim.

We think the district court acted correctly in deciding that there was no sale. In the case cited by the defendant's counsel, we held that a sale by the sheriff, of property specially mortgaged, when there is no surplus, nothing after paying the mortgage, would be useless to the plaintiff, and oppressive to the defendant; one, like the present, in which the price is less than the amount of the special mortgage, would be destructive of the right of the mortgagee; either would have the effect of showing the melancholy insufficiency of the law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

De Armas, for the plaintiff.

Hennen, for the defendant.

Marigny *v.* Remy. III, N. S. 607.

FIRST District.

The Court said:

We are unable to see any difference in the facts of this case, and that of the Mayor *et al. v.* Baily, 5 *Martin*, 321, in which we held that one may have a direct action, on a stipulation in his favor, in a deed to which he was not a party. See also, Duchamp *et al. v.* Nicholson, decided in July last, 2 N. S. 775; 2 *Variæ Resol.* 700, *n.* 18; 1 *Pothier, Obligations*, 45, *n.* 58, 60; *Ibid.* 54, *n.* 71, 72. *ff.* 45, 1, 38, *sect.* 20, 22; 7 *Hulot* 19; *Paillette, Code Civil* 7, *art.* 1121 and 1165; 10 *Pandectes Françaises*, 160, 161; 6 *Toullier*, 164, *n.* 448, 449; and our own Civil Code, 262, art. 21.

Louisiana State Insurance Company *v.* Louisiana State Bank. III, N. S. 610.

A bank is not relieved from the obligation of due diligence, in the case of a note received to be collected, by the removal of the maker's domicil out of the city.

FIRST District.

* MATHEWS, J., delivered the opinion of the court.

This is an action commenced by the Insurance Company against the Bank, in which damages are claimed from the latter as a remuneration for a loss occasioned to the former, by negligence and misfeasance of the officers of the bank, in the collection of certain notes which were placed in their hands by the insurance company, and which they undertook to collect. Judgment was rendered for the plaintiffs in the court below, from which the defendants appealed.

This case is similar in principle to that of Montillet *v.* United States Bank, and Crawford *v.* State Bank, 1 *N. S.* 214, 368, 708.

The correctness of those decisions was admitted in argument by the counsel for the appellants, who contends that there is one fact in the present case, which distinguishes it from those cited, and ought by its operation to release his clients from all responsibility, which might otherwise have arisen from negligence and mismanagement in the undertaking. This is the change of domicile of the maker of the notes from New Orleans before they became due. This suit is a sequel of that brought by the same plaintiffs against Shamburg, decided as shown by the report in 2 *N. S.* 511. In that case they failed to recover from Shamburg, the endorser of the notes in question, on account of the negligence of the agents of the bank in not making a demand of payment from the maker, in the manner required by law. It is contended in favor of the bank, that its officers are justifiable towards the plaintiffs in not having made this demand, in consequence of the removal of the maker of the notes from the city before they fell due. In support of this justification, it is alleged that the bank never undertakes to collect money on notes or bills, when the collection requires operations out of the city of New Orleans, and that the implied contract and consequent obligation to collect ceased, on the removal of the maker of the notes, especially as this fact was known to the owners. In answer to these arguments, it is said by the counsel for the appellees, that the bank could have released themselves

* Judge PORTER took no part in this opinion, being a stockholder of the bank.

from this obligation, to collect, under the implied contract, only by returning the notes to the owners, after the fact of the maker's removal became known to them. Further, that they were led into error by the protest made by the notary who acted for the bank, because that instrument declared that a legal demand was made, and notice had been regularly given.

That the officers of the bank knew of the change of domicile by the maker of the notes before they became due, the evidence of the case abundantly shows. The knowledge of this fact is not so clearly brought home to the appellees; and even if it were, it ought not to change the situation of the parties, so as to release the defendants from their obligation to take all legal steps to collect the notes which they had undertaken. Their duties as agents, could have ceased in no other way, than by a return of the notes to the owners, or an explicit declaration that they would no longer act for them.

The erroneous conduct of the notary, in making a mistaken or false protest, certainly had a tendency to injure the plaintiffs; by it, it seemed that every thing had been regularly and legally done, which was necessary to charge the endorsers. They were thus lulled into security, and of course took no means to do that which they supposed had already been well done by their agents. Admitting this to be true; it is contended by the defendants that they ought not to be made responsible for the misconduct of the notary; being a public officer, he ought to answer directly for his conduct; that a protest could only be made by a notary, and when the bank placed the notes into his hands, its officers had fully and faithfully executed their trust.

In the case of a foreign bill of exchange, the dishonor of which can only be evidenced by protest, this argument would be entitled to great weight. But inland bills and promissory notes do not necessarily require protests by notaries; a demand of payment, refusal and notice to drawers and endorsers may be proved by any competent witness. In the present case we deem it proper to consider the notary as the agent of the bank, because they did by him, that which they might have done themselves.

The appellees claim interest on the amount of the notes from the date of the demand of payment and protest; now no demand was made. The present action sounds solely in damages for negligence and misfeasance in the officers of the bank; it is perhaps true that a fair criterion to ascertain the amount of damages, is the loss of the plaintiffs, occasioned by the misconduct of the defendants, which is alleged to be the sums specified in the notes with legal interest from the day, on which they ought, regularly, to have been protested. If it had been so adjudged in the court below, we would perhaps not have disturbed the judgment. The contest may, as the cause now stands on an appeal, and being a suit for damages, be considered as among those little things which the law does not regard; *de minimis non curat lex.*

However fair and legal the judgment may be, it is a hard case on the defendants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Duncan, for the plaintiffs.

Grymes, for the defendants.

Saulet *v.* Dreux's Syndics. III, N. S. 615.

FIRST District.

A judgment reversing that by which a syndic was appointed, does not avoid acts done by him in the meanwhile.

The law has not fixed the number of days during which the sale of an insolvent's goods is to be advertised.

Mayner *v.* Rollins. III, N. S. 618.

FIRST District.

A contract made double, in fact, but with no mention made of it, is good as a beginning of proof, *à plus forte raison* than would be a contract not made in as many originals as there be parties.

EASTERN DISTRICT, JUNE TERM, 1825.

Flood *et al.* v. Shamburgh. III, N. S. 622.

Where the rules of court do not require a replication, all means of defence are left open to the plaintiff.

The widow who accepts the community, may be sued in the district court.

The wife who has taken an active part in the community, or has not made an inventory, cannot renounce.

What is full value *in money* for a note, is a question of law.

Usury may be committed by agreeing to take the legal rate of interest, on a larger sum than that really lent.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petitioners state that in the beginning of the year 1823, the late William Flood being in want of money applied to defendant for various sums, which were lent him and which he repaid with usurious interest; that among other transactions he gave his note to defendant on the 6th of January, 1823, for 10,000 dollars, on an usurious loan, and made a mortgage without any consideration for the same sum of 10,000 dollars. That the defendant has frequently and publicly declared, that the estate of Flood was indebted to him in both the amount of the note and the mortgage, and that he would institute suit on both, and claim the sum of 20,000 dollars, with interest and costs.

They further state that by reason of these allegations they have

been hindered from selling, and disposing of the estate, or settling the demands against it. That they have frequently and amicably requested the defendant to present his claim, which he refuses to do, but continues to boast of his demands, and prevents the petitioners paying one James Erwin who is a creditor of the estate.

The prayers of the petition are:

That the defendant may be ordered to set forth distinctly the nature of his claims against the estate of Flood.

That he may be ordered to institute suit thereon within ten days from the service hereof, or on making default, that it may be declared the estate is not indebted to him.

That the mortgage may be declared null and void.

That the defendant may be condemned to pay the petitioners, the sum of 24,000 dollars, for his unjust boasting.

That he may be condemned to refund and pay 2000 dollars received by him for usurious interest, between the 1st of January, 1815, and the 1st of January, 1824.

That he may set forth in his answer all the circumstances attending his transactions with the deceased.

The answer denies, that the defendant did ever jactitate or boast, he had a claim against the estate of William Flood for 20,000 dollars, or that he had refused or delayed to bring his suit on the note due him, or in any manner impeded the settlement of the estate; but that on the contrary, he and one James Erwin filed a petition in the court of probates, praying to be paid the amount really due; and afterwards filed another to the like effect against the widow as curatrix of the minor children. That these proceedings were stopped in consequence of an agreement made with the executors, that they would deliver notes received for the sale of property of the estate, which agreement they have failed to comply with. Judgment is therefore prayed by way of reconvention, for the sum of 10,000 dollars, with interest and costs.

The answer proceeds to deny that the consideration of the note and mortgage is, or was usurious, or that the deceased paid him illegal interest, between January, 1815, and 1824. That the note was given for money loaned to Wm. Flood in his lifetime at a year's credit, and that the mortgage was given to secure the same. It concludes by praying judgment against Mary Flood who has accepted the community, and against the minor heirs.

The cause was submitted to a jury on special facts; upon their finding the court below gave judgment in reconvention against the plaintiff, for 8800 dollars, with interest at ten per cent., from the 6th of January, 1824, until paid, and costs of suit. The defendant appealed, and the plaintiffs have prayed the judgment should be amended in their favor.

The first question necessary to be decided is, the legality of the judgment in reconvention in reference to the plaintiffs, who are minors, and who have necessarily accepted the succession with the

benefit of an inventory. As neither the rules of the court in which this case was tried, nor the law require a replication to the answer, it is consequently open to every objection which could have been pleaded to it. Now it is clear that an ordinary action could not be maintained in the district court against minor heirs, who administer a succession through the agency of their tutors or curators, for debts due by that succession; at least not unless it was shown the estate had been settled according to law, and that a partition had taken place between the heirs. This principle admitted, the only thing left for inquiry in this case is, whether the jurisdiction can be acquired by the plaintiffs having drawn the defendant before that tribunal. We are very clear it cannot. They could only bring the defendant there, for the examination of matters of which the court could take cognisance.

This view of the subject leads us to an examination of the correctness of the course pursued by the plaintiffs in instituting this action. The petition as we have seen, embraces several matters, some of which we conceive were properly cognisable by the district court and others were not. In the first we include the claim to recover back illegal interest paid on other considerations, than the money now claimed by defendant from the estate. We also include the demand in damages, for setting up false and injurious pretensions against the succession. These could be fairly brought before the district court, because they were separate and distinct demands by the estate against the defendant, who was not suable before the court of probates.

But that part of the petition which, after acknowledging a debt due, calls on the defendant to state its nature and amount, we consider irregular and contrary to law; as we do all the proceedings which were predicated on it. We can see no object in such an investigation. The district court could not regularly execute its judgment, for the assent, and order of the judge of probates would still be necessary to enable the plaintiff in reconvention to execute it. The whole proceeding supposes jurisdiction in the district court for the purpose of inquiry alone, and for this purpose we have said, that court does not possess it. This point received a particular examination in the case of Vignaud *v.* Tonnacourt's Curator, 12 ***Martin,*** 234. See also Civil Code, 178, art. 137.

Our law has affixed a sufficient penalty on creditors, who do not present their claims against a succession administered under an inventory, to suppose they will delay bringing them forward before the proper tribunal. It is time enough when they present them, to offer those exceptions which will reduce their claim, and it is mere wantonness to drag them before another tribunal, in order to investigate matters which could more properly be offered as an exception to their demand, when they came before that court, which alone has the means, and the power to terminate the matters in contestation. What is conclusive against the regularity of the course of proceeding resorted to in this instance is, that notwithstanding all the litigation

in this action, the defendant might, on going to the court of probates with his judgment, be compelled to discuss again, with the other creditors, all the matters and things at issue in this suit. *Novisima Recop. lib.* 11, *tit.* 28, *ley* 3.

Confining our attention then to the verdict on those matters of which the court could take cognisance, we find the jury have expressly negatived the fact of the defendant having received usurious interest on the loans of money other than that for which the note still due, was given; and, they have also found, the defendant never did set up such a claim as is charged in the petition. There must be final judgment therefore against the plaintiffs on both these demands.

But there is still another and important question open, and that is whether the judgment in reconvention against the widow, must not be affirmed.

Its correctness, independent of the matters which are peculiar to the present case, depends on the extent of her responsibility on accepting the community. If, in doing so, her liability for one-half of the debts, depends on whether the amount received by her from the community equals the moiety of the sums due by it; or in other words, if she take under the benefit of an inventory, then claims against her must be presented in the court of probates; for she is nothing more than administrator of the estate, and it is right, that all the creditors should have an opportunity of presenting their claims, and getting a proportion of the common fund left for the payment of debts. If on the contrary, by the act of acceptance, she becomes responsible personally for the one-half of the debts, she may be sued any where.

In the investigation of this subject, finding the provisions of our Code not so clear and explicit as could be desired, we turned to the ancient law of the country. It has afforded us, however, but little assistance. There existed no legislative enactment in Spain on the matter, and the authors who have written on this branch of her jurisprudence differ in opinion: the better one, perhaps, was, that after accepting, she could not renounce, on discovering the effects of the community, not to be equal to one-half of the debts due by it. *Febrero, p.* 2, *tit.* 1, *cap.* 4, *sect.* 3, *nos.* 71 and 72.

Our Code has so far altered the law, as to give the widow the right of renouncing at any time. Civil Code, 338, art. 78. But in order to enjoy the privilege she must not have taken an active concern in the affairs of the community, and she must have made an inventory. If she has done the one, or fails to do the other, she cannot renounce; and in those cases where she cannot, we are of opinion she is responsible for the one-half of the debts, whether the one-half of the property of the community be equal to them or not. We found this opinion on two articles of our Code; one of which declares, that in the partition of the effects of the partnership of community of acquests and gains, both husband and wife are to be equally liable for their share of the debts contracted during marriage: the other

provides, the wife and her heirs may exonerate themselves from the debts, by renouncing. If she be equally liable with the husband, and only one mode is pointed out by which she can escape that responsibility, she is clearly responsible in her own right, unless that mode has been pursued.

It has not escaped our attention, that the heirs of the husband could free themselves from personal responsibility by accepting the succession with the benefit of an inventory; and that it may be urged, this opinion makes the wife incur a heavier responsibility. But the difference is rather in the means, than in the end. Inventory, and acceptance under it, are sufficient to enable the heirs to escape responsibility in their personal capacity. Inventory and renunciation are both required to enable the wife to enjoy the same privilege; and if both be made, they have the further effect of freeing her from the trouble of administering the estate.

We are greatly strengthened in this opinion from an examination of the Napoleon Code. That body of law formed, as it is well known, the *substratum* of the Civil Code of this state, and so many of its provisions were incorporated *verbatim* into ours, that whenever we find several of its regulations adopted on a particular subject, and a material one omitted, we may safely conclude, that omission proceeded from a difference of opinion in the framers. Now by the 1483d article of that Code, the wife is only responsible to the amount of the inventory, and renunciation is not necessary, to protect her from being answerable in her own right.

In this case the widow accepts the community by bringing suit to have part of its effects adjudged to her. Nothing appears on the record which shows a renunciation, or a right to make it. She is, therefore, responsible in her personal capacity for one-half of the debts of the succession, and was properly sued in the district court.

It only remains to inquire for what sum judgment should be given against her. It has been contended the case is not in a situation for final judgment in consequence of the contradictory finding of the jury, on the first and fourth facts submitted by plaintiffs. The apparent discrepancy which the verdict exhibits on these facts, is removed by an examination of the pleadings, and the issue joined. The first is evidently in relation to the demand for illegal interest already paid. The second refers to the contract sued on.

The jury have found the defendant gave 8800 dollars, for a note of the plaintiff's ancestor, payable in one year for 10,000 dollars. In answer to the eighth fact submitted on the part of the defendant, they state he "gave the full value for the note." What sum of money is full value for a note of the borrower payable at a future day, is a question of law not of fact; as the law has declared that not more than a certain sum shall be taken for the loan. This part of the verdict, therefore, cannot be permitted to influence the judgment of the court.

The strongest objection against the finding of the jury, as not sus-

taining the plea of usury, was, that it only states *what money* was given for the note, and *non constat* there might not have been *money and other property* given for it. This argument would have considerable weight, were it not for the judicial confession of the defendant in his answer, "that the note was given *for money loaned*, to William Flood, at a year's credit."

We consider, then, the fact to be clearly established that the note for 10,000 dollars, payable in one year, was given for 8800 dollars. The judge below thought this agreement was usurious, and that under it no more than the original sum lent could be recovered. But he was of opinion that, as by a subsequent act of mortgage passed to secure the payment of this note, the borrower had stipulated to pay interest at ten per cent. if it was not regularly discharged at the end of the year; that rate of interest could be recovered on the sum really lent, from the date of the failure to comply with the original contract.

We agree with the judge, in the conclusion to which he came on the first agreement, and are unable to concur with him in regard to the second. Both contracts appear to us equally usurious. The first was to get twelve per cent. on the loan of 8800 dollars, for one year; and the second was to receive ten per cent. on a sum made up in part of this usurious interest. Now whether the law be violated by taking a promise to pay fifteen per cent. on the loan of 1000 dollars, for one year: or by an engagement, that the borrower shall pay ten per cent. on 1500 dollars when only 1000 dollars are lent, the consequence must be the same. For there is no difference between the two cases just put, except in the mode chosen, to avoid the prohibition to take more than legal interest on money lent. The law has not been so improvident, as such an argument supposes. It annuls all "*contratos simulados en fraude de usuras.*" To know whether a contract comes within the provisions of this law, we have only to inquire how much money was lent; and how much was to be paid for the use of it. If the latter exceed the rate of interest which the law permits, it is a matter of no consequence how, or in what manner the promise was made, or what consideration is avowed for it. *Novisima Recop. lib.* 10, *tit.* 1, *ley* 20.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed. And proceeding to give such judgment here, as in our opinion should have been given in that court, it is ordered, decreed and adjudged, that there be judgment against the plaintiffs on the matters and things claimed by them in their petition, saving to the minor heirs in the court of probates any exception they may have to the claim of defendant for moneys lent to their ancestor William Flood. And it is further ordered and decreed, that the defendant in this cause, and plaintiff in the demand in reconvention, do recover of Mary Flood, the sum of 4400 dollars, with costs in both courts.

Hoffman, for the plaintiff.

Hennen, for the defendant.

White *et al. v.* Noland. III, N. S. 636.

If a contract be not obligatory when entered into, a change in the law cannot make it so. The *allegata* and *probata* must agree.

FOURTH District.

PORTER, J., delivered the opinion of the court.

The defendant is sued as the endorser of two promissory notes; he pleaded the general issue; there was judgment against him and he appealed.

Part of the sum for which these notes are payable, is expressed in figures. They bear date the months of June and November, 1823, a period at which there was an act of the legislature of this state in force, which declared that no note should be obligatory, or admissible in evidence unless the sum of money mentioned or specified therein to be due or payable, be expressed in words at full length. That statute has since been repealed. But if the notes were not obligatory at the time they were given, a subsequent change in the law cannot make them so. Acts of 1823, 36; Acts of 1825, 58.

There has been a great diversity of opinion in the profession, as to the true construction of the law just referred to. Some contend that the note or obligation is good so far as it is written in words at full length, and that the part expressed in figures must be rejected as surplusage. Others insist it is void *in toto*, and is not admissible in evidence. The question has not been settled by judicial determination. All, however, agree that the part expressed in figures, is, as if it were not written, and makes no part of the obligation.

Such was the decision of this court in the case of Pilié *v.* Mollere. We have, then, in the present case notes declared on, different from those offered in evidence, and the question is whether the judge erred in admitting them. We think he did; the question is precisely the same as that decided in the case just referred to, where the subject was gone into at full length. 2 *N. S.* 666.

The judge *a quo* in deciding the case against the defendant, took a distinction between the maker and endorser, and considered the latter responsible, on the ground that he put in circulation a note as the representative value of the sum mentioned therein, making it good for that sum, in case it should not appear to be valid against the drawer. This distinction cannot receive our assent. The endorser of a promissory note, does not by the act of endorsement, alter or enlarge its legal effect. He is considered as the drawer of a bill. 12

Martin, 184; 2 Phil. on Ev. 10, 17, 41. If the part of the sum expressed in figures is to be considered not written as to the maker, so must it as to the endorser, whose obligation cannot extend beyond the sum for which the note appears on the face of it to be binding on the maker, or in other words, the sum legally expressed in the instrument.

On the whole it appears to us the court erred in permitting the notes offered in evidence to be received, for they did not correspond with those declared on. The petition states two notes, one for 284 dollars and 30 cents, the other for 295 dollars and 66 cents; those offered had no cents expressed in them except in figures, which we are bound to consider as not written.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant as in case of nonsuit, with costs in both courts.

Preston, for the defendant.

Barbarin *v.* Descahaut's Heirs. III, N. S. 639.

PARISH Court of New Orleans.

A petition against the drawer of a bill, which does not set out demand and notice, does not set forth any cause of action, and if judgment be given on it, it will be arrested.

Bowman *v.* Flower. III, N. S. 639.

THIRD District.

The jury has no power to compromise between conflicting evidence, but must decide one way or other; if the scales are equal, he who holds the affirmative should lose. 12 *Martin*, 260; 2 *N. S.*, 494.

Abert *v.* Bayon. III, N. S. 644.

Failure of plaintiff to comply with a condition precedent, may be taken advantage of on the general issue.

SECOND District.

Plaintiff claimed a plantation in defendant's hands by virtue of an adjudication under a transaction. The petition avers a sale positive, and unconditional. Defendant pleaded general denial. The proof introduced by plaintiff shows a condition precedent to be performed by her, before the obligation of defendant would be complete.

PORTER, J., said:

The question then presented for our decision is, whether the defendant can take advantage of this condition without specially pleading it?

It might, perhaps, be sufficient in support of his right to do so, for him to urge, that if this is to be decided by strict and technical rules of pleading, the first fault was committed by the plaintiff. It being a well established doctrine, that where the right of action depends on a condition precedent, its accomplishment should be set out in the declaration; otherwise, if the right is once vested and defeated by matter *ex post facto*. 6 Bac. Ab. 339; 7 Co. 10.

If under the liberal mode of practice wisely established in this state, such strictness be not necessary, still the rights of the parties under the evidence offered, are not the least altered, or impaired; and they have the same right to insist at the trial, that the plaintiff has failed to show a cause of action, that they would have under a more technical system by taking advantage of it in pleading.

The judge of the district court in the opinion delivered by him on the motion for a new trial, seems to have considered, nothing to have been put at issue but the averments in the petition; and that what the defendant relied on, was matter of avoidance which should have been specially set up.

The judge was correct in saying, that nothing but the averments in the petition were put in issue. But that petition avers a sale, positive, and unconditional. The proof introduced shows a conditional one. The defendant might perhaps have objected to the variance, but if he chose to admit it, it was received with all legal consequences that flowed from it, as proof the defendant promised to deliver the plantation; but as proof too, that he was not to deliver it until the plaintiff should comply with the condition expressed therein.

The judge, therefore, though correct in considering that nothing was put at issue but the averments in the petition, erred in the effect which he gave to the evidence by which those averments were supported. And he particularly erred in imagining this was special matter in avoidance, which should have been set out in the answer. Matters in avoidance acknowledge the obligation to have once existed, by averring these matters to have discharged it. They cannot, therefore, be given in evidence under the general issue, because by it the plaintiff only comes prepared to prove the defendant made such a contract as is alleged. But in this instance the appellant does not rest his defence on the fact that his obligation to deliver the land, was discharged by matters and things which avoid it. He insists that up to the moment of trial, no obligation had existed on his part to deliver it, because an act necessary to create that obligation had not yet been performed by the plaintiff. This we are satisfied he should have been permitted to show under the general issue, either by relying on the evidence introduced by plaintiff, or by any other proof in his power.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this cause be remanded for a new trial, with directions to the district judge not to reject evidence of the defendant to show the plaintiff refused to furnish endorsed notes for the amount of the purchase-money of the plantation; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Cuvillier, for the plaintiff.

Morel, for the defendant.

Marigny *v.* Hunt. III, N. S. 651.

FIRST District.

By the laws of Spain a real action is one which demands a specific thing, movable or immovable. *Febr. p.* 1, *cap.* 4, *sect.* 4, *tit.* 4, *l.* 1, *no.* 70. The statute of Louisiana, granting the right of being sued only in the parish wherein one habitually resides, makes no direct exception in regard to an hypothecary action. The judge of the place where the debtor resides, alone, has authority to grant an order of seizure and sale.

Skipwith *et al. v.* Gray. III, N. S. 655.

THIRD District.

Plaintiff cannot proceed at the same time with an order of seizure and a suit in the ordinary way.

If they be both resorted to, the *via executiva* merges in the *via ordinaria.*

The act of 1817, section 6, "in any real action where there are *two* or *more* persons, &c. residing in different districts," means two or more *defendants.*

Guidrey *v.* Vives. III, N. S. 659.

PARISH Court of New Orleans.

Surety on a note has not the same liability with an endorser. See Cooley *v.* Lawrence, 4 *Martin*, 639.

Spraggins *v.* White. III, N. S. 661.

Plaintiff may prove payment of a written order in favor of defendant without producing it, if the existence of the order be admitted.

COURT of Probates of New Orleans.

PORTER, J., delivered the opinion of the court.

This action was originally commenced in the district court, and the

defendant having died before it could be tried and decided there, it was transferred to the court of probates.

The plaintiff states that, in the year 1821, he entered into a special, or particular partnership with the defendant, the object of which was the purchase of slaves in the Atlantic states, on joint account and risk, to be transported to this state for sale. That eighty-two slaves had been purchased of which seventy-three have been sold by the defendant, and the proceeds received by him, and that two others are yet in his possession.

That the remaining seven slaves have been sold or disposed of by the petitioner, for the proceeds of which he has been always willing and ready to account.

That the amount of sales made by the defendant is 41,237 dollars; that the balance due the petitioner is 4000 dollars; and that the defendant though often requested, has refused to pay this sum, or to render a true account of his gestion of the partnership affairs.

The defendant pleaded the general issue, and averred the plaintiff owed him 3000 dollars, for which he prayed judgment.

The representatives of the estate of White were made parties in the probate court, and that tribunal after hearing the evidence gave judgment for the defendant, and decreed that the slaves remaining unsold, should be disposed of, and the proceeds divided between the parties. The defendant appealed.

When the argument was closed, we believed the case was before us in such a shape, as would enable us to decide it on the merits. Further reflection however on a question presented by a bill of exceptions taken on the trial, has brought us to the conclusion that the cause must be remanded.

The plaintiff offered to prove by a witness that he, the witness, had paid to defendant, on plaintiff's order, the sum of 250 dollars. This testimony was objected to, on the ground, "that the plaintiff could not give parol evidence of the payment of said order, as the order itself would be the best evidence, and must be produced."

This objection recognises the existence of the order, and as a consequence of its existence denies the right of proving its payment in any other way than by the production of the writing itself. Now whether the order would be the best evidence of the payment or not, depends on a fact of which the bill of exceptions gives no information; namely, whether the defendant gave a written receipt on it; for if he did not, it is neither the best evidence, nor any evidence at all against him, that it was paid.

On this ground the witness should have been permitted to testify. The rule in relation to the proof of payments by parol testimony, though written receipts should have been given, is carried further in the works which treat of evidence, than it is necessary for us to go to decide this case. Phillips states that the defendant may prove by parol, the plaintiff's demand is satisfied, though it should appear, the plaintiff signed a receipt. Phillips on Evidence, 170; 1 Espinasse, 13, 213; 1 East, 460.

This rule is perhaps founded on the principle, that as written instruments may be shown to be discharged by parol evidence proving payment: there is no danger of permitting the same kind of proof even when a receipt is given. This argument is still open to the objection, that it is not the highest evidence of which the case is susceptible. But in this instance there is no proof, there is higher evidence of the defendant's having received the money, the payment of which the parol evidence was offered to establish.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the case be remanded with direction to the judge *a quo*, not to reject parol testimony of the payment of an order of the plaintiff in favor of defendant on the ground that the order would be better evidence of such payment; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Hoffman, for the defendant.

Strawbridge, for the plaintiff.

Robinson *et al. v.* Williams. III, N. S. 665.

FIRST District.

The defendant alleged that, on a fair settlement, plaintiff even owed him, a detailed account of which would be filed, when required, which he thus pleads in compensation. Afterwards, without being required, or having leave of court, he filed an account and endeavored to prove it. This was irregular. Compensation must be specially pleaded.

Evans *v.* Nash. III, N. S. 669.

THIRD District.

The surety on a twelvemonths' bond cannot be released on the ground that the sheriff neglected to file the bond with the execution.

Bainbridge *v.* Clay *et al.* III, N. S. 671.

FIRST District.

Hennen claimed money in court as assignee of a judgment creditor: Bainbridge claimed it to be applied to his *fi. fa.* The court overruled Bainbridge's motion. There is no evidence, however, of Hennen's assignment. It is manifest, this arises from the view which the court below took of the case, deeming this proof unnecessary. Case remanded to allow Hennen to show the assignment, and that the levy of Bainbridge was of no avail. See this case, *post*, 4 *N. S.* 56.

Tabor *v.* Johnson *et al.* III, N. S. 674.

The district court is not wholly deprived of jurisdiction, *ratione materiæ*, in suits for the recovery of debts against a succession.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

This suit was instituted to enjoin proceedings in execution on twelvemonths' bonds, given for the price of property which had previously been sold under execution, and to have said bonds decreed to be null and void. An injunction was granted by the court below, which was afterwards set aside, and judgment rendered in favor of the defendants, from which the plaintiff appealed.

The facts of the case, as exhibited by the record, show that a judgment had been obtained against the tutor of minor children, and was executed by seizing and selling property belonging to the succession of their father; part of which was purchased by the plaintiff in the present suit at a credit of twelve months, and the payment of the price secured by bonds, which he now seeks to have annulled, on account of the alleged nullity of the judgment rendered against the tutor and minors, in consequence of incompetency in the court which rendered said judgment; the whole proceedings having taken place in the district court.

The counsel for the appellant insists:

1. That the district court was wholly without jurisdiction *ratione materiæ* in the case which was prosecuted against the tutor and minor heirs, &c.

2. The judgment pronounced in that case is absolutely null and void, in consequence of such want of jurisdiction.

3. That it is not necessary to appeal from judgments absolutely void, in order to have such nullities decreed, &c.

4. The judgment being thus void, all subsequent proceedings of execution, seizure and sale of property under it are also void, and consequently, the appellant's bond given for the price of the property, is a mere nullity. There are some other points relied on by the appellant, which, from the investigation, we are about to give to the subject, need not be examined.

Notwithstanding the principle which seems to be established, by some of the expressions of this court in the case of Vignaud *v.* Tonnacourt's Curator, as reported in 12 *Martin*, 291, after much reflection on the present case, we are inclined to think that district

courts are not wholly deprived of jurisdiction *ratione materiæ* in suits which relate to the enforcement of payment of debts due from a succession, to creditors under contracts with the deceased.

It may be assumed, as undeniable, that the district courts are tribunals of general jurisdiction; that they have, by their constitution, power to decide on all disputes brought before them, which relate to the affairs of the citizens of the state; either as it regards their persons or property. This unlimited power to hear and determine in all cases, can be lessened, altered, and taken away, or rendered concurrent with other courts of the state, only by legislative authority in the enactment of laws, which deprive the courts of general jurisdiction, of part of their power, and transfer it to others, either in relation to the persons of suitors or the subject matter of litigation.

We believe it may be safely asserted, that on the change of government, from its situation under the late territory, to that which it now holds under the power of the state, all the judicial authority which the old superior court had was transferred to the present district courts, with the exception, that judgments rendered by the latter are not final, but may be appealed from.

The power of the late superior court extended to every subject of litigation, except those which were exclusively transferred by the territorial legislature to inferior courts created by its authority. Amongst others thus created, in 1805, courts of probates were established by giving that species of jurisdiction to the judges of the different county courts; their authority was limited to "receiving and taking proof of wills, granting letters testamentary, and letters of administration, also directing and approving appraisements," &c. The same powers were transferred to the parish courts after their institution in 1807. According to these grants of power, the jurisdiction of the superior court, in relation to claims against a succession arising out of contracts made by the testator or intestate, was not in any manner lessened or impaired, either expressly or impliedly. Thus stood matters with regard to the jurisdiction of the courts of probates and those of common and general jurisdiction until the adoption of our Civil Code, in 1808.

We must now inquire how its provisions affected the powers of those two courts.

In the case cited from 12 *Martin*, an explicit opinion has been expressed that the court of probates is the proper tribunal to take cognisance of claims against a vacant succession. This opinion is founded on several articles of the Code defining the powers and duty of that species of court, which by necessary implication confer that kind of jurisdiction. Admitting that in relation to a vacant succession, a court of probates has exclusive jurisdiction, it does not follow as a necessary conclusion that the district court are deprived of it absolutely *ratione materiæ*, but only on account of the peculiar situation of the thing, and of the persons who represent such successions. If inheritances accepted with the benefit of an inventory,

whether the heirs be of full age or minors, must be administered in pursuance of the rules established for vacant successions, with the necessary exceptions consequent on the different situations of these various species of estates; we are necessarily led to the same conclusion in relation to the court, which ought regularly to take cognisance of all matters appertaining to the settlement of successions which are inventoried, appraised and sold, and that is the court wherein all these things are ordered to be done, and to which the law has given the power of determining the manner in which the debts of the deceased are to be paid, and decreeing partition of property amongst the heirs. The provisions of the Code on the subject of vacant estates, and those accepted by heirs of the age of majority, under an inventory, seem to require that they should be administered in a manner analogous to that ordered for the administration of the estates of insolvents. In cases of the latter description, all suits and claims against the bankrupt are required by law to be cumulated before the court which holds cognisance of the *concurso*, which may be any of ordinary and competent jurisdiction to the extent of the matter in dispute.

Pursuing the principle established by law for the settlement and distribution of an insolvent's property, our Code impliedly requires all the creditors of a succession vacant or accepted with an inventory, to concur before that court which directs the inventory and sale of property, and possesses the power of classing and ordering payment of the debts. Civil Code, 177, art. 108 and 168, art. 136 and 137.

In relation to the administration of the estates of minors by their tutors, the Code is silent, as to the manner in which the debts of successions are to be paid; according to its provisions, it was the duty of a tutor to cause the whole of the property to be sold, after inventory and appraisement. This power to sell received some limitations and restrictions by an act of the legislature passed in 1814, which last law still left a right to sell for the payment of debts; but is also silent as to the manner in which such payments may be enforced. As the estate is administered under an inventory, perhaps the same rules ought to prevail which govern in cases of beneficiary heirs, and all creditors should appear before the court of probates to demand payment of their claims. This mode would be certainly correct on a suggestion of insolvency of the succession.

Admitting that the rules of the Code show an evident intention in the legislature to give exclusive jurisdiction to the court of probates in all matters relating to successions, it is believed that they were not constituted with powers sufficiently ample to carry into complete effect that intention; because these courts had no authority to call a jury to their aid in the administration of justice; and the ordinance of congress of 1785, which was extended to the territory of Orleans, secured to its citizens the trial by jury. See 2d art. of said ordinance. The right secured to have this mode of trial, being in general terms extended to all contests which related either to the persons or pro-

perty of the citizens, could not have been taken away by the territorial legislature, either by express enactment or by any construction given to these laws.

Under such regulations, the creditors of a succession and the persons administering it, had a right to claim a jury to decide any contested fact, and therefore, the court of probates was inadequate to maintain exclusive jurisdiction. Our state constitution does not secure the right of trial by jury in civil cases; it limits that constitutional privilege to criminal accusations. Since the change of government the courts of probates have perhaps been possessed of powers sufficient to carry into effect, to the full extent, the apparent intention of the legislature as expressed in the Civil Code. There is a decision of this court to be found, 7 *Martin*, 274, wherein an opinion was expressed denying jurisdiction to the court of probates in a claim against a vacant succession, which is in direct opposition to the doctrine established by our judgment, in the case cited from 12 *Martin*.

The court, in the former case, did not take into consideration the increased power of courts of probates, produced by the change in the fundamental laws or constitution of the community. We believe the opinion in that case was erroneous, and that expressed in the last case to be correct, especially as it is subsequent to the act of the legislature of 1820, defining the jurisdiction of the courts of probates.

Taking for granted then the exclusiveness of the jurisdiction of these courts in relation to successions vacant, or claimed under benefit of an inventory, we deem it to be the duty of the other tribunals of the state, in all cases where the matters in litigation are more properly cognisable in the courts of probates, to send such cases before them, to the intent that all persons interested in a succession, may have their claims investigated and decided on as in a *concurso de acreedores*.

Allowing to the courts of probates exclusive jurisdiction in causes which appertain to estates, administered by persons deriving authority from them, either directly or indirectly, a question then arises whether this exclusion of the courts of ordinary jurisdiction exists absolutely *ratione materiæ* or *ratione personæ?* We are inclined to think that the exclusive jurisdiction depends more on the peculiar situation of the parties, that on the subject matter of dispute; perhaps somewhat on both. Debts due from a succession must necessarily originate in contracts or *quasi* contracts which existed between the creditors and the deceased. These are clearly subjects for the cognisance of courts of general jurisdiction; but the succession is administered by persons, who act for others and not for themselves, or for others with themselves, as in the case of beneficiary heirs.

These persons are amenable to the court from whence they derive their power; and in that tribunal all matters, which relate to those for whom they act, are most properly cognisable by creditors and minor heirs. If sued in any other court, they may rightfully claim to be sent before that, which is more effectually competent both in relation to their situation, and to the matters which concern the ad-

ministration, and the interest of those for whom they administer. Should a court, not regularly competent, retain cognisance of a cause, and render judgmeut, as in the present case, it is necessary to inquire what effect such a judgment would produce. Does it import such nullity as can in no way be covered? In other words is it so radically and absolutely void, as to be incapable of producing any effect, or is it affected only by relative nullity?

If, as we have assumed, it be true, that the district court wanted jurisdiction in the case in which the judgment was pronounced, and under which the property was sold by execution, and purchased by the appellant, only on account of the situation of the defendants, and peculiar circumstances of the matter in litigation, it may be fairly doubted whether it be affected by any species of nullity. But we are unanimously of opinion that the sale under it is not absolutely void, but only voidable.

The property of minor heirs (to place the case on a footing most favorable to the plaintiff) was sold without legal or judicial formalities. Such defect of title may be cured by consent or acquiescence; and the purchaser can on no legal ground withhold payment of the price; nor does he show any equity in his petition, for he only prays to be relieved from the pressure of an execution, without offering to give up the property to the persons whom he alleges to be the legal owners. It would be unjust to suffer him to retain the property and price; should he be hereafter pursued by the heirs for the recovery of the former, they ought in justice and equity to succeed, only on condition of refunding the latter, on its being shown that it was appropriated to the payment of their ancestor's debts. See *Toullier, p.* 668 and 669; and 2 *Biret, Traité des Nulletés, p.* 376.

According to this view of the case, the first and second propositions used in defence by the appellant, are demonstrated to be untrue, and the third and fourth, being only corollaries of the two former, must partake of their fate.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Woodruff, for the plaintiff.

Watts and *Lobdell*, for the defendants.

Skillman *v.* Jones. III, N. S. 686.

The plaintiff needs not file any replication. Fraud may be shown by him without having alleged it in his replication. If there be a replication it may be read to the jury to place before them a charge which might be made *ore tenus*. Defendant cannot be admitted to demur to the evidence, unless he admit the facts which may be presumed from the evidence by the jury, as well as the direct facts.

The return of a citation cannot be explained by parol, even by the sheriff or deputy.

FIRST District.

MARTIN, J., delivered the opinion of the court.

On the return of this case, which we remanded in February term, 1824, 2 *N. S.* 163, the defendant had leave to file a supplemental petition, in which, he stated that, since the institution of the suit, he had paid, satisfied and discharged the plaintiff's claim, according to a receipt, the copy of which was stated to be annexed to the answer; no copy, however, was annexed; a jury was sworn, and the defendant having admitted the execution of the note, there was a verdict for the plaintiff, but on the defendant's motion, a new trial was ordered, on the ground that the receipt, mentioned in the supplemental answer, was mislaid, and could not be found at the time of the trial.

The plaintiff, now by leave, replied, that the receipt, mentioned in the last answer, was obtained by fraud and on false pretences, and without any thing having been paid.

There was a verdict and judgment for the plaintiff, and the defendant, after an unsuccessful attempt for a new trial, appealed.

Our attention is first called to four bills of exceptions, taken by the defendant's counsel.

1. The first is to the opinion of the district court, in refusing him a continuance, on the ground that he had not been served with a copy of the plaintiff's replication to his supplemental answer, whereby he was unprepared to meet the charge of fraud.

2. The next was taken, on the refusal of the judge to permit the introduction of the testimony of the sheriff, offered by the defendant, as a witness to explain the return on the citation, and to prove that it was not served in both languages.

3. The third was to the replication being read to the jury, and to the introduction of evidence to support the allegation of fraud.

4. The last was to the refusal of the court to allow the defendant to demur to the evidence, because he had cross-examined one of the plaintiff's witnesses.

[Skillman v. Jones.]

I. The plaintiff was not bound to file any replication; the defendant's affidavit did not state that he had any witness, by whose testimony he could rebut the charge of fraud, whose testimony was not within his reach, and could, if time was given, be obtained.

II. If the return on the citation was not perfectly correct, it could not be explained by parol evidence, even that of the sheriff or his deputy; the proper remedy, in such a case, was to call on the sheriff to amend his return and make it conformable to truth.

III. As the charge of fraud might have been urged on the trial, without having been set forth in a replication, it follows evidence was admissible to support it: and the replication might be read to the jury, to place before them a charge which might have been made *ore tenus.*

IV. The defendant could not be permitted to demur to the evidence, unless he admitted the truth of the fact, which the plaintiff endeavored by the testimony of Gordon to establish, viz. that the plaintiff received nothing from the defendant, and consequently, the receipt was fraudulently obtained, or was the evidence of a fact, which did not exist.

On the merits, the execution of the note was admitted, and a receipt produced to establish the payment.

The case stood on the question of fraud in obtaining this receipt. The plaintiff introduced two witnesses, Gordon and Farrie.

The first stated that, in a conversation between the defendant and the plaintiff's attorney, he heard the defendant say he had paid nothing for the receipt in question.

On his cross-examination this witness being asked whether the defendant did not say he had paid no money, but had given some other thing in consideration, replied that he had given nothing for it. The witness, in a conversation with the defendant, advised him not to offer the receipt in evidence, if he had given nothing for it, when the defendant began a conversation relative to some contract between him and the plaintiff, but the witness stopped him, repeating the advice he had given him before. In the course of this conversation the defendant said the receipt had been given for the forfeiture of some contract.

Farrie deposed that when the cause was last called for trial, the defendant, alluding to the receipt on file annexed to one of his bills of exceptions, the original of which was not then known by his counsel to be on file, said he had paid no money for the receipt, and was about stating what consideration he had given, when he was stopped by the jury.

We think the district court erred in refusing the new trial. We are not able to discover on what evidence the fraud was found.

Gordon deposes to the part of the conversation, which the defendant and the plaintiff's attorney had in his hearing; he does not give us the whole of the conversation. It is not very probable that the defendant, who sought to avail himself of the plaintiff's receipt, and

who was charged with having obtained it fraudulently, would declare to the plaintiff's attorney, in the hearing of a third person, that he had not given any consideration for the receipt, that he had given nothing, without endeavoring to cover his fraud by the allegation of some ground on which he might honestly avail himself of the receipt. We find that in two other conversations which he had with the same witness and Farrie, he urged that although no money had been paid, yet there was another consideration for his discharge.

Indeed the very fact of a receipt having been given without any thing being paid, would not necessarily constitute a fraud. One may release a debt due to him, by admitting that it is paid; and if this admission was made, without any fraud in the debtor, he might honestly avail himself of the creditor's generosity.

Fraud is never presumed, it must be proved.

Neither the pleadings nor the evidence enable us even to guess at the kind of fraud which the defendant is charged with; it is not urged that the receipt is not a genuine one, that it was given in error, or that any deceit was practised by the defendant.

Every man must feel insecure and alarmed, if, when he has the evidence of his discharge under the creditor's hand, on a mere allegation of fraud, parol testimony may be introduced of part of a conversation of his, in which a fact was advanced, which the previous and subsequent parts of the conversation probably explained, and fraud be hence gratuitously inferred.

It is true the plaintiff had two verdicts, but the first was, while the defendant was incapacitated to defend himself, and his opponent was forbidden to prosecute him; the second was before the allegation of fraud was made, and when this receipt was not produced, the counsel being ignorant of the place where it was. The third is that which we are applied to, to set aside.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge to proceed thereon as if it had not been submitted to a jury; and it is ordered the plaintiff and appellee pay costs in this court.

Morse, for the plaintiff.

Carleton, for the defendant.

Gould *v.* Bridgers. III, N. S. 692.

THIRD District.

Plaintiff claimed 323 dollars, 35 cents, also 350 dollars. There was verdict for 673 dollars and 75 cents, and judgment for 673 dollars, 35 cents. The court did right to reduce the verdict 40 cents, the amount claimed.

Davenport's Heirs *v.* Fortier *et al.* III, N. S. 695.

Although the time to bring the action of a rescission *a quanti minoris*, be elapsed, the vendee may successfully oppose the vendor's suit.

Although the action of *quanti minoris* does not lie on a judicial sale, on account of a vice or defect in the thing sold, the vendee may avail himself of a want of quantity.

FIRST District.

MATHEWS J., delivered the opinion of the court.

This is a suit brought to recover the first instalment of the price of a tract of land, sold at a probate sale and purchased by one of the present parties defendant, for whom the other became surety. The sum of 4033 dollars, 13 cents is claimed, and judgment being rendered for that amount in the court below, in favor of the plaintiffs; the defendants appealed.

The case comes up on a bill of exceptions to the opinion of the judge *a quo*, by which he rejected testimony offered on the part of the appellants to prove a deficiency of more than one-twelfth part of the whole tract of land. And the judge's refusal to allow an amended answer in which the defendants offered to plead, that he had sold and conveyed the property to a third person. This last exception was abandoned by the appellants' counsel. As to the first we are of opinion that the judge erred. The evidence was rejected on the ground of limitation to actions for diminution of price or cancelling of

contracts on the part of Buger. Civil Code, 352, art. 46. Although the right of a purchaser to sue in such cases, be barred by the lapse of a year, he does not lose his privilege to except to the payment of the full price, (in an action brought by the seller,) on the ground of a deficiency in the quantity of the immovable sold. This question has already been settled in the case of Thompson *v.* Millburne, 1 *N. S.*, 468.

But admitting that the defendants ought to be allowed the benefit of this exception, it is contended by the counsel for the plaintiffs that the present case is not one to which the provisions of the Code, in relation to surplus or deficiency in land sold are applicable. Because he says there is no indication of the extent of the premises at the rate of so much per measure; in other words it is a sale *per aversionem*, and as in such cases, the purchaser would be entitled to any surplus which might exist in the tract, without the payment of additional price; so on the other hand, the vendor ought not to be compelled to a reduction in the event of deficiency.

We believe that neither of these propositions is true. In the first place, the extent of the front and depth of the land in question were fully indicated by acres and fractions in front, and by ordinary depth. The courses of the side lines were also specified; by all which the superficial quantity could easily be ascertained; and *id certum est quod certum reddi potest.* Should it be admitted that the sale which gives rise to the present action was one *per aversionem*, it does not follow, as a consequence, that the converse of the proposition, which allows a purchaser to retain the whole field, although it exceeds the estimated quantity, without additional price, is true; that is, that the seller is not bound to diminish the price, in proportion to the deficiency of the thing sold. See *Pothier, Contrat de Vente, chap. 3, de la quantité de la chose vendue.*

Another objection is made to the claim of diminution of the price, on the ground of the sale being a judicial sale, in which the action of redhibition is not allowed; and in support of this doctrine, we are referred to the Civil Code, 358, art. 74. The action of redhibition, there spoken of, relates to the defects and vices of things, not to any deficiency in quantity; therefore, although it has already been decided, that sales made by order of a court of probates, at the instance, and for the benefit of the heirs of a succession, are of the nature of judicial sales; still, we are of opinion, that the law has not any application to deficiencies of quantity in an immovable, sold by a court of probates. Although the defendants in their answer claim a rescission of the sale, that ought not to deprive them of the benefit of their exception *quanti minoris.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that the cause be remanded to said court, to be tried *de novo*, with instructions to admit all legal evidence, to show the deficiency alleged in the answer of the land sold, and that the appellees pay costs of this appeal.

Turcas v. Rogers. III, N. S. 699.

The endorsee of a note, after its maturity, must allow any equitable defence to the maker.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This is a suit brought by the holder of a promissory note against the maker, which was transferred by endorsement to the plaintiff, after it became due. The defendant in his answer pleads a want of consideration for the promise, and states that the note was given solely to accommodate the payor Seguro, by raising money on it, and that it remained in his hands after a final settlement of all accounts between them, and was improperly transferred. On these pleadings and the evidence adduced in the case, judgment was rendered in the court below in favor of the defendant, from which the plaintiff appealed, and which was reversed in the appellate court, and the case remanded for a new trial, and judgment. On the second trial being pronounced for the defendant, the plaintiff again appeals.

It is true, that the evidence of the case, as it was received in the district court, makes out a defence somewhat different from that relied on in the answer; but if properly received, it ought nevertheless to shelter the appellee from the payment of money which he did not owe at the commencement of the action. The introduction of the testimony was in no instance opposed as not corresponding with the *allegata.* A bill of exceptions was taken on the first trial of the cause to the admissibility of Seguro, the endorser, as a witness; the ground of incompetency is not stated in the bill, and on the former trial of the cause before this court, the plaintiff's counsel abandoned the exception, and claimed the benefit of the testimony given by the witness. On the second trial in the district court, he excepted to certain portions of that testimony, as inadmissible on account of the situation of the witness, being endorser on the note.

The part of the evidence now objected to is that which has a tendency to destroy the effect of the note transferred, in the hands of the present holder, by proving the circumstances under which it was assigned, as accompanied by a collateral security consisting in a note of Samuel C. Young, with John Gravier, endorser, payable to the present appellee, and which Seguro had received from him and delivered to the appellant in the same manner and for the same purpose, for which he had received, that is, a collateral security for the payment of the note now sued on. The note, being transferred after it became due, is subject to the same equity in the hands of the as-

signee, that it would have been in those of the assignor. See Chitty, 165. And if the latter be competent to prove any thing relative to the validity of the note, and the circumstances under which it was assigned, he ought to be permitted to tell the whole truth, by giving a fair disclosure of the contract between him and his assignee. If credit be given to Seguro's testimony, the note in question was good and valid in the possession of the present holder, who as well as the transferor might have enforced payment previous to the recovery or receipt of the money secured by the note of Young and Gravier; when that was paid to the holder, who is also possessor of the defendant's own note, a discharge of the latter was immediately effected by compensation; for, having received it to collect for the benefit of the appellee, so soon as he obtained the money on it the appellant became his debtor for that amount.

The testimony of Young, who was called as a witness on the last trial in the court below, strengthens that of Seguro; for he proves the payment to the plaintiff of the full amount of the note, which the latter testifies to have been delivered to Turcas, as a collateral security.

According to this reasoning in the cause, it is readily perceived that we have examined it more in relation to the proof adduced than to the allegations of the answer, and this mode of investigation is tolerated by the law of the *Novisima Recopilacion*, so often referred to in judgments rendered by the appellate court.

Whether the note now sued on be considered, as given originally to accommodate the payee, or as evidence of a debt really owing to him from the appellee, the view which we have taken of the case, shows that it has been compensated and paid with the funds of the latter, whilst in the hands of the appellant, and directly to him. The authorities, cited by the counsel for the plaintiff, are, therefore, not applicable to the present case.

It is, therefore, ordered, adjudged and decreed, that the judgment ofthe district court be affirmed, with costs.

Dumoulin, for the plaintiff.

Preston, for the defendant.

Williams *v.* Raby. III, N. S. 703.

THIRD District.

If the defendant deceitfully obtain possession of a slave of the plaintiff, and afterwards has an execution levied on him, and purchases him, the only measure of damages is the hire till the seizure.

Despau *et al.* *v.* Swindler. III, N. S. 705.

THIRD District.

The courts of this state must recognise the capacity of the magistrates of the different parishes, appointed by the governor with the approbation of the senate. Their certificate will not be rejected, because not dated in the parish of their function; this fact will generally be presumed.

Lafon's Heirs *v.* His Executors. III, N. S. 707.

COURT of Probates of New Orleans.

The court of probates ought not to order the balance in the execution to be paid into court, to be by it applied to the payment of the debts and legacies.

The executor cannot pay any debt, without the order of the court, especially one against which the plea of prescription lies.

[Lafon's Heirs v. His Executors.]

A parol admission of the debt, does not enable workmen and domestics to repel the plea of prescription.

The COURT say:—We are ignorant of the right of the court to detain a defendant in jail, because he is unwilling or unable to discharge its judgment, and at the same time send process against his property.

EASTERN DISTRICT, JUNE TERM, 1825.

CONTINUED.

Chartres *v.* Cairnes *et al.* IV, N. S. 1.

FIRST District.

This case related to an assignment made by the principal defendant to persons, in trust, in the city of New York, for the purpose of paying certain creditors designated by the deed and for his own support, until he should be discharged in pursuance of some insolvent or bankrupt system. An attachment being laid in New Orleans on certain funds in the hands of a garnishee, the latter pleaded that he had had notice of the assignment previous to the laying of this attachment, and had agreed to hold the funds for the assignees. The court below dismissed the attachment, and plaintiff appealed.

The correctness of this judgment depends on the validity of the deed of trust, and this or the law of New York as being the *lex loci contractûs*. To ascertain the law of New York, the court were referred to the decisions of the supreme court of New York, the court of errors, and to the decisions of the court of chancery reported by Johnson.

The COURT say of these decisions:—They have been attentively examined by us; and it is believed, that the judgment of the district court is supported by them. In opposition to these decisions, a decree is furnished, lately made by a court of chancery in that state, by which

the same deed of trust now under consideration, is declared null and void, by reason of the reservation or provision contained therein for the benefit of the grantor or assignor. This decision is most clearly correct, according to the laws of this state, on the subject of insolvencies; but it seems to be contrary to the principles, recognised as prevailing in the state of New York, by the judgments of the supreme court, and court for the correction of errors, in the cases cited. Being a court of inferior jurisdiction, we cannot admit its decree has such force as to overturn those principles which seem to be established by the tribunal of highest authority. See Johnson's Rep. vol. 20, and the cases there referred to, p. 447; particularly, vol. 15, of that Reporter, p. 571.

It is, therefore, ordered, adjudged and decreed, that the judgment of the inferior court be affirmed, with costs.

Livermore, for the plaintiff.

Smith and *M'Caleb*, for the defendants.

Lewis *v.* Peytavin. IV, N. S. 4.

The record of a slave's conviction of theft, cannot be read in a suit between other parties.

If a note sued upon, as lost, is admitted by the defendant to have existed and not pretended to have been paid, presumptive evidence of its loss will suffice.

But the plaintiff will be made to give security for the defendant's indemnification.

SECOND District.

MARTIN, J., delivered the opinion of the court.

This is an action on a note of the defendant, which is alleged to be lost, (10 *Martin*, 36,) the plaintiff having been robbed of it. The defendant pleaded the general issue; there was judgment against him, and the defendant appealed.

At the trial, the district judge, notwithstanding the opposition of the defendant, received in evidence, the record of the conviction of a slave charged with robbing the plaintiff; a bill of exceptions was taken.

The counsel of the defendant relies strongly on the case of Steele *v.* Caseaux, 8 *Martin*, 318, in which we held that the conviction of a slave cannot be read, in the action against his owner. That case

was much stronger than the present, because owners of slaves are cited on the trial, and have the opportunity of defending them.

Our learned brother, in the district court, was of opinion that "the record of the slave's conviction was good evidence to prove that a robbery took place on the plaintiff, and to prove that act alone, the court received it."

The counsel for the appellee has urged, that in the case cited out of *Martin*, the record was introduced to prove the very point, on which the plaintiff predicated his right to recover, viz., that the defendant's slave had done him an injury, for which he, the defendant, was liable; whilst in the present, the record is offered not to prove the original transaction on which the note was given, nor even the existence of the note or its contents, but solely the collateral facts of its loss.

The answer of all this is that all facts must be proved by legal evidence, that the record of a conviction, to which the person, against whom it is offered, was not a party, is, as to him *res inter alios acta*. It is said the conviction may have been had on the evidence of the party, who offers the record in evidence. Slaves may have testified to the facts, and their evidence, which is of no avail against white persons, might thus have indirectly that effect, which the law denies it. If these were the only difficulties, a court might see by a perusal of the record, whether it was objectionable on either of these grounds. The true reason is that the party against whom it is offered might perhaps have made a legal objection to some of the witnesses sworn; might have cross-examined them and given quite a different coloring to their testimony, or might have rebutted it.

On this ground, we think the record ought not to have been read.

Objection was also taken to the reading of the deposition of Killiam, on the ground that the witness derived all his knowledge of the facts he related, from the plaintiff; but the judge states he considered it good evidence to prove that, on or about the 20th of June, 1820, the plaintiff had the defendant's note in his possession, and that it was not endorsed. These circumstances, the deposition shows the witness declares, not from what he heard the plaintiff say, but from what he saw.

The plea of the general issue, that is to say, the denial that the defendant did make the note, the payment of which is demanded of him, is disproved by the written evidence afforded by him, and which it appears he permitted to be read, without opposition.

He certifies, under his own hand, that the plaintiff declared to him, that he had been robbed of the note, given him by the defendant, on the 15th of June, for 720 dollars, payable at sixty days, and forewarned him not to pay it, unless it was brought with the plaintiff's endorsement. This certificate bears date of the 27th of June.

Killiam, whose testimony was objected to on the ground that his knowledge of the facts related, was entirely derived from the plaintiff, deposes that towards the middle of June, he saw in the possession of the plaintiff, in Baton Rouge, a note or a paper, in the French lan-

guage, purporting to be a note of the defendant, for 720 dollars; that he heard it read in English, by a person conversant in both languages; that it was not then endorsed.

An advertisement, put by the plaintiff, in the Baton Rouge Gazette, on the 28th of June, 1820, announcing he had been robbed of the note, and offering a reward, was read without opposition.

Two witnesses Landry and Richard, deposed to the contract for a certain number of cattle, which the defendant paid for by his note to the plaintiff for 720 dollars; and 60 dollars in cash.

All this testimony has been admitted without any opposition, on the part of the defendant. Perhaps no part of it could have been successfully tendered, if the defendant's counsel had insisted on the legal proof of the robbery; but this evidence so received is legal evidence, by the permission of the defendant.

It is incontestibly proved that the plea of the general issue is absolutely false. We must then conclude that the defendant gave the plaintiff his note, and that it is now due. He does not pretend that he had paid it, or any part of it.

Why then does he resist the claim? Because he is afraid the note may be produced and he compelled to pay it. It is sworn it was not endorsed, a short time before (according to the plaintiff's declaration, certified by the defendant and read with his consent) the plaintiff was robbed of it. But the plaintiff may recover, endorse and put it in circulation. No call has yet been made on the defendant, although five years have elapsed since proclamation of the robbery was made, and a holder who acquired it, after its maturity, would hold it liable to every equitable plea that might be opposed to the payee.

Still it is just the plaintiff should yield every possible means of indemnification to the defendant, against every possible chance. This the judge *a quo* decreed to him, by ordering the plaintiff to give bond with surety. The district court directed this to be done; but the defendant's counsel contends that the district court erred, in directing the bond to be given to the clerk, whilst it ought to be to the defendant. The bond is ordered to be delivered to the hands of the clerk, and this does not imply that it shall be payable to the clerk, but to the defendant, for whose benefit it is to be given.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiff.

Moreau, for the defendant.

Johnson *et al. v.* Inerarity *et al.* IV, N. S. 10.

FIRST District.

This was a very important case, turning, however, wholly on facts: the plaintiffs failed to make out their case, and there was judgment below dismissing the petition, which judgment was now affirmed.

Villeré *v.* Armstrong *et al.* IV, N. S. 21.

The testimony of the subscribing witnesses cannot be insisted on if he be out of the state.

The parish judge, who received the sheriff's bond is a good witness to prove its contents in case of loss.

The party who excepts, is bound that the bill contain sufficient matter to enable the supreme court to test the opinion of the judge *a quo*.

SECOND District.

PORTER, J., delivered the opinion of the court.

Judgment was rendered, on motion of the attorney of the second district, against the two last named defendants, on a bond executed by Armstrong, as sheriff of Assumption, with Watkins and Candolle, his sureties. They have appealed, and in addition to the questions presented by the bills of exceptions, have made the following points.

1. The bond is void under the statute set forth in defendants' answer.

2. The sheriff was never qualified according to law to collect taxes and the sureties are not bound.

The first bill of exceptions is taken to an opinion of the judge, admitting a witness to give evidence in relation to the loss of the original bond. The ground, stated in the bill for this objection, is, that in the written notice furnished by the attorney for the state, of his intention to move for judgment against the defendants, no mention is

made of the bond being lost. To this a most satisfactory answer was given by the testimony, namely, that the loss had taken place after the notice was filed. 9 Wheaton, 581.

The second contains the same objection as the first, with the additional reason, that the witness could not testify to the contents of the bond; that the subscribing witness to it should be produced. Other testimony shows the subscribing witness to have left the state; the secondary evidence was, therefore, correctly received.

The third exception was made to the court permitting the parish judge to give evidence of the loss of the bond, because it was his duty not to suffer the sheriff to act without giving bond and security, and, he was liable to a penalty if he neglected this duty. We see no ground for this objection. The parish judge was certainly a good witness to prove the loss, because the terms of the exception admit there is higher evidence behind; namely, the bond itself. Now, if this be true the objection has no force; if it is not, then the parish judge was totally free from the imputation of not having taken the bond; and consequently, stood disinterested as to the fact of its loss.

But it appears the judge was also examined, to prove the execution of the instrument, by the sheriff and his sureties, and we are not so clear, that he was a legal witness for that purpose, but we deem it unnecessary to decide the question, as we are of opinion there is sufficient proof on the record, (exhibited by the answer of the defendants, and the testimony of witnesses to whom no legal objection can be made,) the bond was executed as the plaintiff alleges.

The fourth does not contain evidence to give us a sufficient understanding of it. If the written evidence, to contradict Hubbard, was matter of record, over which the court had no control, it should have been received, and the reason given by the judge was a bad one, namely, that the apparent contradiction in the witness's evidence, in the present case, and that which he swore in the suit of Martin *v.* Candolle, arose from a mistake made by the court in taking down his testimony in the latter case. If, on the contrary, that testimony was in a trial had in the same term, over which the judge had control by correcting any error, which might have crept into a statement drawn up by himself, then it was properly refused. It was the duty of the party excepting to have brought up sufficient evidence to explain this, and for want of it, we cannot say the court below erred.

The fifth bill of exceptions is taken to a refusal of the court to direct a *subpœna duces tecum* to the parish judge to bring into court a bond, which that judge had previously testified was lost. There was no error in this opinion, and the exception to it appears to us most unadvisedly taken.

We have already said the facts on which the state relies for judgment are satisfactorily proved, and the law arising on them requires us to give judgment against the defendants. They have reproduced again, and argued elaborately, an objection frequently made in this court; that bonds required by statute are not binding on the obligors,

unless the form and rules prescribed by the act under which they are taken have been pursued. Our opinion heretofore on such questions has uniformly been adverse to such a defence; and we have heard nothing in the present case to induce us to change that opinion. Indeed no reasoning on general principles could authorise us to do so, as by a statutory law of Spain, unrepealed as yet by our legislature, and of course still in force, it is expressly declared, "that in whatever manner a person shall appear to have deemed it proper to bind himself to another, he shall remain bound." *Novisima Recop.* 10; 1, 0; 3 *Martin*, 569; 5 *Ibid*, 194; 2 *N. S.* 672; 5 Mass. Rep. 814; 9 Cranch, 28.

But it is agreed Armstrong, the sheriff, did not pay up the taxes he had collected the preceding year, and therefore he should not have been permitted to renew his bond the second. This objection could not be received from him, and is consequently not good for his sureties, as they can have no defence, to the validity of the contract, which he had not.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Dumoulin, for the plaintiff.

Ripley, for the defendants.

Sacerdotte *v.* Matossy. IV, N. S. 26.

No person has such an interest in the renewal of a license to keep a gambling house as may be the object of a contract.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petitioner states he purchased from the defendant the unexpired time of a license, which he had to keep a gambling house, and also his right of preference to have the license renewed.

That by the terms of the contract the defendant was to have the benefit of the license up to the period it expired, but that on that day, instead of permitting the petitioner to get it renewed in his name, the defendant, in violation of their contract, obtained the license in his

own, by reason of which the plaintiff has been put to much expense and sustained great loss.

The answer denied the petition set forth any cause of action, and in case it did, it put at issue all the allegations contained in it.

The judge refused to hear any evidence in support of the petition, and directed it to be dismissed with costs. The plaintiff appealed.

We think the judge did not err. The legislature of this state has thought proper to tax, for charitable purposes, establishments of this kind, and whatever difference of opinion may exist as to the policy of such a law, it is the duty of the courts to give it effect, and enforce its provisions, as they would any other. By the 9th section of the act authorising the licensing houses of the description spoken of, it is provided, "that the licenses contemplated by this act shall be given by the treasurer of the state, and shall be for the term of one year, from the time of granting the same." No person has an interest in the renewal of these licenses, which can form the subject matter of a contract; no more than any other officer of the state would have to sell his right, to be re-appointed to an office which, by law, had a limited duration. The act, by fixing one year as the duration of these licenses, contemplated not only the collection of an annual revenue, but the exercise of a salutary check on persons, whose occupation is liable to be so much abused. No man, then, can have a right to obtain a license, unless we should imagine a right founded on the treasurer of the state violating his duty, by making engagements to prevent the exercise of that discretion, which the law, for wise purposes, has conferred on him. In point of fact, we do not believe that officer made any such bargain, and if he did, the plaintiff's case would not be mended by it. *Ex turpi causa non oritur actio.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Seghers, for the plaintiff.

Canonge, for the defendant.

Moulon *v.* His Creditors. IV, N. S. 29.

The endorser of an insolvent, who is also a debtor of his, has only a right to be placed on the bilan for the balance.

PARISH Court of New Orleans.

MATHEWS, J., delivered the opinion of the court.

In this case Jumonville, the appellant, opposes the homologation of a tableau of distribution of the insolvent's estate, on the ground of not being placed thereon, to the full amount of his claim, as one of the creditors.

The facts of the case appear to be these:

The appellant became a creditor of the insolvent to the amount of about 21,000 dollars, in consequence of endorsing the notes of the latter, which the endorser was compelled to pay on the failure of the maker. During the time of his responsibility, as endorser, he owed to the insolvent 6000 dollars, which he alleges, he retained in his possession, as a security or pledge against his liability on the endorsements.

His counsel insists, that he has not only a right to withhold that amount from the estate of the insolvent in compensation of his claim against said estate; but also to recover a dividend from the remainder, proportioned by the full amount of his demand of 24,000 dollars; because it is shown that the syndics will not have funds of the bankrupt to pay more than about fifty per cent. of the whole amount of debts.

In support of this doctrine, the appellant is declared to be privileged, on the pledge, which he has a right to retain until the whole of his claim be paid. To establish the truth of this proposition, we are referred to the principles which prevail in the commercial law of the United States, as recognised in the different states of the Union. The principal authority cited is Chitty on Bills of Exchange, wherein at page 56, in the notes, references are found to the adjudged cases on which the author founds his dicta. These do authorise a person who has accepted bills for the accommodation of another, to retain the funds of the latter, or withhold debts due to him, under certain circumstances, as an indemnity against his liability, as acceptor. The same rule ought to govern in case of endorsement to accommodate a maker of a promissory note. But, it does not follow, as a necessary consequence, that in the event of the bankruptcy of persons thus accommodated, acceptors and endorsers should be at liberty to hold the funds in their possession or withhold payment of sums due to the

bankrupt, in compensation of their claims against him, and still receive a dividend of his estate in proportion to the full amount of such claims.

Such a conclusion is evidently absurd, for it would be to make the effect greater than the cause. Let us analyse the present case. The insolvent owes to the appellant 24,000 dollars; the latter owes to the former 6000 dollars; this last sum is only capable of effecting a payment of the first, *pro tanto*, in the ordinary course of trading, but if the doctrine contended for, by the counsel for the appellant be adopted, it will effect a much larger payment; for, by compensating the 6000 dollars, due from the appellant to the bankrupt, the debt due to the former will be only 18,000 dollars; of this, it is agreed, that the estate of the insolvent will pay only 9000 dollars; but, if the creditor be placed on the bilan for the entire amount of 24,000 dollars; then these 6000 dollars will have paid 9000 dollars, which is absurd.

In this view of the case, we have considered that the right to retain a pledge, can have no more extensive effect given to it, than the privilege to compensate its value against claims of the pledgee. The privilege, allowed by the judgment of the court below to the appellant, to benefit by compensation to the whole amount of the debt he owes the estate, is as great as can be authorised by sound principles of law, equity and justice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs to be paid by the appellant, in his individual capacity.

Moreau, for the plaintiff.

Dennis, for the defendant.

Dennis *v.* Durnford. IV, N. S. 32.

An inhabitant of the city of New Orleans, cannot be sued in the court of probates of East Baton Rouge, on the ground that he was executor to a deceased person, whose *mortuaria* was under the Spanish government, depending before the commandant of Baton Rouge.

THIRD District.

MARTIN, J., delivered the opinion of the court.

The defendant, while the province of Louisiana was under the

government of Spain, was appointed executor to the last will of Pousset, whose *mortuaria*, or proceedings in regard to his estate, were carried on before the Spanish Commandant at Baton Rouge.

Lately, the court of the parish of East Baton Rouge appointed the plaintiff as the attorney of the absent heirs of Pouset, and the defendant, a resident of the city of New Orleans, was cited by the said attorney, before the said court of probates, to render an account of his executorship.

The defendant pleaded commorancy in another parish, viz. that of Orleans. There was a judgment against him, in the court of probates, which was reversed in the district court. The plaintiff appealed.

It does not appear to us that the district court erred. On the organisation of a judiciary power, in this country, after the United States took possession of it, none of the courts that were established was a continuation of any Spanish tribunal. Accordingly, all suits then pending were begun *de novo* in the American tribunals, according to the court law, without any regard to the former tribunals.

A creditor, who had sued his debtor before the governor, intendant, or any magistrate, began *ab ovo*, in the court pointed out by the new law.

According to this, the defendant must be sued in the parish of his residence; this is the general principle; it has a few exceptions, but the plaintiff has not shown that this case is within any of them. The tribunal of the commandant of the district of Baton Rouge, before which Pousset's *mortuaria* was opened, has no longer a legal existence, and the circumstance, if it exist, of its records being deposited with the parish judge of the parish of East Baton Rouge, does not authorise its court of probates to act on suits commenced in the Spanish tribunal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Dennis, for the plaintiff.

Hennen, for the defendant.

Shelmerdine *v.* Duffy. IV, N. S. 34.

The obligation resulting from an endorsement, is a legal consequence, and if it render the endorser necessarily liable to pay, the law must determine in what capacity, and to whom.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This case was tried in the district court on pleas which the parties denominate a demurrer and joinder therein, as taken from the ordinary mode of pleading, according to the rules of practice, under the common law of England. In conformity to the laws and principles, established by the laws which regulate the practice of courts, under our system of jurisprudence, it is an answer to the plaintiff's petition, by which the defendant admits all the facts, alleged by the former, but denies their legal consequence, as claimed by him. By this manner of pleading an issue in law is formed. Judgment was rendered in the court below, in favor of the defendant, from which the plaintiff appealed.

The suit is brought by the drawer of a bill of exchange, which he alleges was accepted by Johnson & Heno, and endorsed by the defendant for their use, the latter being equally bound in justice to pay the amount thereof, because he was that much indebted to the plaintiff. The bill at maturity was protested for non-payment by the acceptors, and notice thereof given to the defendant as endorser; it was carried back by the payee as holder, to the drawer, who was compelled to pay the amount, with interest and ten per cent. damages, all which he claims to have refunded to him by the defendant. These are the principal allegations contained in the petition. It contains also an interrogatory, which was answered by the defendant, wherein he acknowledged that he did endorse the bill, but denied being indebted to the plaintiff, and that he agreed to become surety for the acceptors.

The court below seems to have based its judgment wholly on this answer, in which we are of opinion there is error.

In the first place, it ought not to have been received in contradiction of the facts, admitted by the demurrer; and secondly, even if it should, it does not contradict them so effectually as to secure the defendant from liability. By admitting the act of endorsement, the obligation resulting from it, on the endorser, is a legal consequence; and if it necessarily render him liable to pay the amount of the bill, the

law must determine in what capacity and to whom he is liable to pay.

The petition is not so explicit as it might be in relation to the manner in which the appellee is sought to be made responsible; but from the whole contest, it is tolerably evident that the intention is to charge him as surety for the acceptors. The bill appears not to have been transferred, in the usual course of negociation, according to the custom of merchants. The payee was the holder, when he procured the endorsement of the defendant, which could have no other effect than to impose on him an obligation similar to that of the acceptors, either conjointly with them or as their surety; and perhaps he would be entitled to the privilege of division and discussion, as provided for by law in cases of joint obligations or sureties; but these are privileges which must be taken advantage of by pleading, which has not been done in the present case. Unless the irregular endorsement made by the defendant be considered as a mere nullity, an act without any legal effect, he ought to be held liable on it to the plaintiff; for, his obligation being similar to that of the acceptors, the drawer had a right on paying and taking up the bill to pursue him for the amount. But we have held already, in one or two cases, that such endorsements are not without effect; on the contrary that they impose an obligation on the endorsers to pay. See Chitty on Bills, Am. ed. of 1821, p. 440, and 4 *Martin*, 699.

Being of opinion that the allegations in the petition are sufficient in law, to authorise the plaintiff to recover, and that according to the answer they must be all received as true; it is ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant and appellee, the sum of five hundred and sixty-two dollars and seventy-nine cents, with interest thereon, at the rate of five per cent. per annum, from the date of the protest for non-payment of the bill of exchange declared on, and also ten per cent. on the amount of said bill, as damages, with costs, to be paid by the defendant in both courts.

Waggaman, for the plaintiff.

Lockett, for the defendant.

EASTERN DISTRICT, JULY TERM, 1825.

Pilié *v.* Molleré. IV, N. S. 42.

If the fractions of a dollar be expressed in figures, the note is not therefore void, but the fractions will be rejected.

SECOND District.

MARTIN, J., delivered the opinion of the court.

The present suit is brought on the note which was the ground of the case between these parties in July term last. 2 *N. S.* 666.

The plaintiff now declares on a note, for 2471 dollars, considering the 38 cents, which are written in figures, and not in words, at full length, (as the act requires,) as if they were not written.

There was a plea of the general issue, and a judgment of nonsuit. The district court being of opinion that the note was not obligatory, and could not be given in evidence.

The note was executed on January 5th, 1824, while an act of the legislature (since amended) was in full vigor. This act, approved on the 1st of March, 1823, provides that, after the 1st of April following, no promissory note shall be obligatory or admissible in evidence unless the sum of money therein expressed to be payable, be expressed in words at full length.

It is clear that the strict sense of the words used supports the decision of the judge *a quo*, and when the case was before us last year, we were inclined to believe, that when it became necessary to pro-

nounce the opinion of this court, on the construction of the act, we should be obliged to adopt his conclusion.

On maturer reflection, we think that it leads to disastrous and absurd consequences, manifestly contradictory to common reason. In such cases, we deem it our duty to avoid a strict literal construction, in order to avert a result, evidently in opposition to the presumed will of the legislature; believing that the expressions used leave it doubtful, whether the legislature meant that the note should be absolutely void of obligation and inadmissible in evidence, or whether it should be so only for the part in which its directions have been disregarded.

If the fractions of the cents only were in figures, as if a note was for five hundred dollars, sixty cents and 1-4, it would be monstrous to say the note should be considered as a nullity. The present case is nearly as strong.

Judges must construe the law, if possible, to prevent waste and destruction, *ut res magis valeat quam pereat*, and they must not suffer what is useful to be vitiated by what is useless: *utile per inutile non vitiatur*.

We consequently think it our duty to say that the note is obligatory and admissible in evidence, as to the part of it, in which the directions of the legislature have been complied with; that the cents, as with regard to them these directions were disregarded, are to be considered as not expressed, and their being in figures does not vitiate the note, so as to prevent its being obligatory and admissible in evidence.

The act of last session, which amends the former, may, in some degree, afford a clue, by which we may be enabled to discover the will of the legislature. Indeed, it is a *quasi* legislative construction of the former.

The testimony supports the plaintiff's claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the plaintiff, for two thousand four hundred and seventy-seven dollars, with interest at five per cent., from the time of the protest, according to the act of 1822, p. 44, and costs in both courts.

Derbigny, for the plaintiff.

Hennen, for the defendant.

Farrar *et al. v.* M'Cutcheon *et al.* IV, N. S. 45.

A devise to the mother for life, remainder to the children, in equal parts, to be held for the survivors, down to the last, in the event of death before marriage or without issue, is a substitution, which the law reprobates.

COURT of Probates of New Orleans.

MATHEWS, J., delivered the opinion of the court.

The question, which is submitted to the court, in the present case, for solution, arises out of a supplemental petition of the plaintiffs, filed in a suit, which was commenced for the purpose of obtaining a final liquidation and partition of the estates of the late Richard Butler and his wife, amongst their respective heirs. It relates entirely to that part of the last will and testament of the said Richard, which disposes of the residue of his property (after various specific legacies) to his two sisters, Rebecca M'Cutcheon, and Harriett Hook, and their children. The sole object of the petitioners, according to the tenor of the supplemental petition, seems to be to obtain a decision on that clause of the will which gives to the children of the sisters of the testator, *i. e.*, whether it be void, as containing a substitution prohibited by the Civil Code, according to the provisions of the 4th chap. 42, and book 3.

The judgment of the court below is against the right of the children, from which an appeal was taken by their *defensor* or *curator ad litem.*

This is the first instance, in which the courts of justice in this state have been required, in the course of judicial proceedings, to apply the law relating to substitutions to a particular case, according to the ordinary rules of construction or interpretation of dispositions made by testament.

The question, which now occurs to us for the first time, has, however, been considerably agitated in various tribunals of the kingdom of France, and we are aided by many decisions in cases depending on the 896th article of the Code Napoleon, which is similar to our own Code, on the subject of substitutions and *fidei commissa.* It is true, that from a hasty view of these discussions, they seem to be somewhat contradictory in themselves, but on a closer inspection and more minute investigation, they are capable of being pretty well reconciled. From them and commentaries on the French Code, several axioms or general principles are deducible, which we believe to be correct.

1. The dispositions of testaments ought not to be annulled, until they

necessarily present a substitution. 2. If the claim be susceptible of two interpretations, it ought to be interpreted in that way, which avoids a substitution and gives effect to the will. 3. Whenever the disposition is made in such terms as necessarily to comprehend a charge to keep for and transmit to a third person, it contains a substitution, although not literally expressed. 5 *Toullier*, 58 and 69.

It may also be safely admitted as true, that in every substitution or fidei-commission, the agency of three persons is required, viz., the donor or testator, the person who receives the donation to hold and enjoy for a certain time, and the one to whom he is bound to transmit it. See *Pandectes Françaises, vol.* 4, *p.* 21, a quotation from *Merlin, Quest. de Droit.*

The clauses, in the will now under discussion, which the plaintiffs insist do not necessarily imply a substitution, are expressed in the following terms. After various legacies ordained by the testament, as above stated in general terms, the testator proceeds: "Item, I give and bequeath all the rest, residue and remainder of my estate, property and effects, to my sisters Rebecca M'Cutcheon, and Harriett Hook, to have and to hold the same, equally to be divided between them, for and during their natural lives. Item, upon the death of the said Rebecca M'Cutcheon and the said Harriett Hook, or either of them, I do give, devise and bequeath, the share or shares, which the said decedent or decedents shall have possessed as aforesaid, or which by the last above devise and bequest, I intended, she or they should possess, to the child or the children of the said Rebecca M'Cutcheon and Harriett Hook, or either of them, to be equally divided between the said children; and in case of the death of either of the said children, previous to marriage or death without issue, then his or her share to be equally divided among the surviving children as aforesaid, and in case only one child as aforesaid should survive, then the share or shares above last mentioned, and the estate and property aforesaid shall vest and remain in the said child and his or her heirs aforesaid."

The counsel for the plaintiffs contends that, according to a just and legal interpretation of these dispositions of the testament, they present two substitutions. 1. The donation to the sisters of the testator, to hold the property during their lives, and transmit it to the children. 2. The right of survivorship, created amongst said children. From these positions the nullity of both clauses is said to be necessarily induced. As to the first of these alleged nullities, it is believed, not to be put in issue by the pleadings of the case, and is perhaps such, supposing it to exist, as could only be taken advantage of by the legal, forced heirs of the testator. The same thing might be said of the latter substitution, except for an alleged compromise or transaction, which is said to have taken place between the heirs of the testator and those of his wife, both instituted, and forced or legal. In the consideration of that allegation we proceed to examine the donation to the children: and we commence by stating that, in our opinion, the clause of the will, under which they take, does necessarily contain

a substitution. In opposition to this opinion, which is the same that was held by the court of probates, it is contended, that a donation or legacy to several persons, with the right of survivorship, does not *ipso facto* present a substitution. This may be true, where an entire thing is given to many; and its truth is well supported by several of the cases cited from the French authors on the subject of substitutions. See 5 *Toullier, p.* 60, *n.* 46.

But this is only true, when an entire thing is left to several persons, who hold it undivided. When, by the disposition of the will, it is evident that the legacy left to many is bequeathed in separate and distinct portions, with a right of survivorship, a substitution takes place *ex necessitate rei.* See the same authority, *p.* 67, *n.* 49.

Now, in the present case, the devise to the children, of the property, which had been given to their mother, for life, is in equal parts, to be held for the survivors, down to the last, in the event of death before marriage and without issue. In relation, therefore, to them, we have no doubt of the existence of a substitution, such as reprobated by the Code. We have pronounced, on this case, without having inquired very particularly whether the children of Mrs. M'Cutcheon and Mrs. Hook, have been properly represented in the cause. It is, however, a matter of no great moment; for, if they are not before the court, according to the forms and solemnities of law, the present judgment will not affect any claim, which they may hereafter make, relative to the matters now in dispute.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, &c.; and it is further ordered, that the costs of this appeal be borne by the estates of R. Buller and his wife, in equal portions, &c.

Dennis, for the plaintiffs.

Watts and *Lobdell*, for the defendants.

Hyde *et al.* v. Henry. IV, N. S. 51.

FIRST District.

Decided, declarations operating a change of domicil must be made both in the parish the party removes from, and that to which he removes. Civil Code, 19, art. 1 and 2.

Dow *v.* Shimmin. IV, N. S. 53.

PARISH Court of New Orleans.

Decided, that a written synallagmatic contract, being deposited in the hands of a third party who gave each party a copy, is at least *prima facie* evidence of their bargain and the testimony of this common friend may place it beyond doubt. The court below did not err either in admitting it, or the evidence of the third person in addition to the agreement, although it did not make full proof.

Bainbridge *v.* Clay. IV, N. S. 56.

The creditors of the assignor may seize the debt assigned, as long as the assignee has not given notice of the assignment to the debtor.

FIRST District.

MARTIN, J., delivered the opinion of the court.

This case was lately remanded for further proof, the same judgment was given, and Bainbridge appealed. 3 *N. S.* 671.

The facts of the case are, that Clay obtained a judgment against Oldham, and Bainbridge one against Clay. Bainbridge having taken out a *fieri facias* on his judgment, Polk, the agent of Oldham paid into court the amount of Clay's judgment against Oldham, and Bainbridge prayed that the court order the money thus in court to be applied to his judgment.

Hennen intervened and claimed the amount of the judgment against Oldham, as assignee of Waggaman to whom he alleged Clay had assigned it.

A debt due to the defendant on a *fieri facias* cannot, as to third parties completely pass to the assignee, unless there be what, in sales of tangible property, is called a tradition, or delivery, and this is effected, as to choses in action, by notice of the assignment to the debtor.

In the present case, the record shows that the sheriff received Bain-

bridge's *fieri facias* against Clay, on the 1st of February, 1825. On that day, according to law, Clay's personal property was so affected by the *fieri facias* as no longer to be saleable by him, to the injury of the plaintiff in the *fieri facias*.

Folwell, a witness of the assignee, deposes he delivered a copy of both assignments to Oldham, on the fourth day after he left New Orleans, and he believes he left that city on the 31st of January. So that, according to this witness, the notice, which was in lieu of the tradition of property, took place, after the *fieri facias* of Bainbridge was put in the hands of the sheriff.

Farrie, another witness of the assignee, deposes that, in a conversation that took place in the clerk's office, between Hennen, Waggaman, and Polk, the agent of Oldham, he heard Hennen tell Polk, he was the assignee of Clay's judgment against Oldham, and requested Polk not to pay the money to any body else. The witness believes this was before Bainbridge took out his *fieri facias* against Clay, but he cannot recollect any particular circumstance that induces this belief; neither can he recollect the time, when he issued the execution, *i. e.*, when it went out of the office. He is the deputy clerk. Polk's testimony does not make the evidence much clearer.

Admitting what is extremely dubious, that it clearly results from this man's testimony, that the conversation with Polk took place before the *fieri facias* issued, nothing shows that Polk was such an agent, to whom such a notice could be legally given. It only appears he had Oldham's money in his hands and was directed to discharge the judgment.

We therefore conclude this conversation does not establish a legal notice. Polk did not consider himself authorised to pay Hennen, although he proposed giving his check, since he paid the money in court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, that the money in court, paid by Polk in discharge of Oldham, be applied to the discharge of Bainbridge's judgment against Clay, and that the assignee and appellee pay costs in this court.

The appellee by *Waggaman* and *Hennen*, asked for a rehearing, on the grounds that Polk was such an agent of Oldham as to be capable of receiving notice of the assignment for him. Also, that the *fieri facias* against Clay was no lien on this debt owing him by Oldham inasmuch as Oldham resided in another parish where the sheriff of Orleans could not act.

The rehearing was refused. In announcing this, MARTIN, J., said: We have considered that the notice to Polk had not the effect of destroying the right of the plaintiff in the *fieri facias*. This notice was not equivalent to a delivery or tradition, for it left Oldham the absolute control of the thing assigned. He might, notwithstanding

this notice till it was communicated to him, have made a legal payment to Clay, or any other assignee, besides Hennen, who might have presented himself. Hennen was like a purchaser of goods, before delivery, till knowledge of the assignment was given to Oldham himself; for till then a payment would have defeated his right on Oldham.

By placing his *fieri facias* into the sheriff's hands, Bainbridge acquired a lien on Oldham's property, susceptible of being levied on, on all Clay's goods in his stores, or any of his agents, holding for him, on the debt of Oldham, in the hands of Polk, or any other agent, and this right was not defeated by Polk paying the money into court.

In the present suit, both parties had a claim which the court might have recognised. Bainbridge had a *fieri facias*, which gave him a lien on any property of which Clay had the disposition. This money, then, being at Clay's disposition, would have been ordered to be paid to him, unless another person opposed his demand by showing a better right. Let it be granted that Hennen might have successfully opposed Clay's call on the court. How stands the matter between Hennen and Bainbridge? Hennen has an assignment; but the assignment of a debt is not in the way of a creditor, till served on the debtor; because that service alone deprives the latter of the faculty of paying to any one, but the assignee. Bainbridge, on the contrary, produces a *fieri facias*, which gives him a lien on all Clay's property. It attached on the debt due to Clay by Oldham, on the money the instant it was paid in discharge of Clay's judgment, and thus became Clay's.

But it is said there is evidence of notice to Oldham himself.

According to Folwell's testimony, copies of the assignments were delivered to Oldham on the 4th of February; the *fieri facias* was put into the sheriff's hands on the first. According to Farrie, admitting that the notice to Polk was notice to Oldham, there is no great certainty that Polk was notified before the *fieri facias* issued. The witness believes it, but cannot recollect any circumstance that induces such a belief. These gentlemen are Hennen's own witnesses.

Our attention has been drawn to a letter of Oldham, in which he acknowledges the receipt of Hennen's letter, apprising him of the assignment: but this letter is without a date; and its post-mark refers to a day posterior to that on which the *fieri facias* came to the sheriff's hands.

So that no part of the evidence on the record establishes, what is essential to Hennen's recovery, notice to Oldham, anterior to the sheriff's receipt of the execution.

We did not consider the bill of exceptions required any notice. It appeared to us obvious the judge was right. Evidence was offered of "the verbal acknowledgment of Oldham to the witness, that he had received notice of the assignment from Clay to Waggaman, and Waggaman to Hennen, before the execution issued in favor of Bainbridge."

Now this was mere hearsay testimony. Oldham should have been brought. It is now said here, that this acknowledgment was made before Bainbridge took out his *fieri facias*. But if that was the case the counsel ought to have made it appear on the record.*

M'Coy *v.* His Creditors. IV, N. S. 67.

The fees of the counsel appointed to represent absent creditors, are in no case to be paid by the mass.

FIRST District.

PORTER, J., delivered the opinion of the court.

The attorney appointed to represent the absent creditors took a rule to show cause why a certain sum due him for professional services to the absent creditors, should not be paid by the estate. The court after hearing the parties discharged the rule, and the attorney appealed.

The following facts have been agreed on:

1. It is admitted the failure was under the Spanish law, and not under the act of 1817, relative to voluntary surrenders.

2. The value of the services is admitted, and that L. Pierce was, from the commencement, the attorney for the absent creditors, and appointed by the court.

3. It is admitted no dividend will be coming to the absent creditors.

The act of 1817, section 38, expressly provides, "that in no case shall the fees of counsellors, appointed in behalf of absent creditors, be paid by the mass, but shall be levied on the amount of the sum, which shall be recovered for the creditors so absent.

We are of opinion, that this act, by the negative expressions used in it, in relation to the particular subject under consideration, takes away all discretion from the courts, and forbids a recurrence to the Spanish law, or practice, to ascertain how the representatives of absent creditors shall be paid. And even if it did not, we have been

* By the Code of Practice, art. 545, judgments though entered on the docket of the judgment of the court, constitute no lien on the property of the defendant. The record of it at the mortgage office alone gives it the force of a judicial mortgage. As to movables, actual seizure only can affect any specific effects.

unable to find any thing in either, which sanctions the present demand.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Pierce, for the plaintiff.

Maybin, for the defendants.

Changeur *v.* Gravier's Heirs. IV, N. S. 68.

The heirs are bound only to the amount of what the estate was worth at the death of the ancestor.

If a debtor on receiving a release, bind himself to pay the debt if he becomes able, his heirs will be bound to apply his estate to the discharge of the debt.

FIRST District.

MARTIN, J., delivered the opinion of the court.

This case was before us in June, 1824, and we remanded it, because the record did not enable us to ascertain the portion of the released debts which the estate can pay. 2 *N. S.* 545.

The plaintiff contends that a piece of property, known under the appellation of the batture of the faubourg St. Mary, which makes part of the estate of B. Gravier, ought to be valued at 100,000 dollars; which is admitted to have been its actual value in 1820, when, under a judgment of this court, this property was, it is said, finally divided among the defendants; it having been decreed the preceding year to be their common property. Gravier *et al. v.* Livingston *et al.* 6 *Martin*, 281.

The defendants urge that this property ought to be valued, between the plaintiff and them, at its value in 1793, at the death of their ancestor.

2. The defendants further hold, they are not liable for any part of the released seventy-five per cent., unless their ancestor, at his death, had come to so good a fortune, as to be able to pay the whole amount of these released debts, with interest.

I. On the first question we are of opinion that the heirs are chargeable only for the value of the batture, at its value at the time of their ancestor's death, viz. 10,000 dollars. It appears this piece of property was, long before our decree, in possession of one of the heirs,

who disposed of the whole, and that afterwards the other heirs sued, and recovered their part of it from the vendees.

II. If, at the death of B. Gravier, he had property sufficient to discharge a part of the released debts, we think his heirs are bound to distribute the proceeds of his estate, among the creditors; their ancestor promised that "If God blessed his endeavors, he would pay them their whole claims, principal and interest, when his situation would allow it."

The facts of the case show that, after paying B. Gravier's debts in Louisiana, there remained a balance of 39,542 dollars and 75 cents, to be applied to the payment of his debts in Bordeaux. These debts are shown to have amounted at his failure, to 53,671 dollars. For one-fourth of these he promised to pay at twelve, eighteen, and twenty-four months, and after a period of upwards of forty years, they must, in the absence of any proof of their remaining due, be presumed to have been discharged; except that of the present plaintiff, which is demanded and we have said is not prescribed, equal to the net proceeds of the estate after the payment of the debts posterior to the concordate.

The plaintiff is, therefore, entitled to the one-fourth of the original debt, which was to be paid absolutely, and to his dividend, on the balance, left from the sum of 39,442 dollars and 75 cents, after the deduction of the fourth of his original debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be amended in the following manner, that is, that judgment be entered in favor of the plaintiff. 1. For the sum of 571 dollars, with interest on a third of the sum, since the 29th July, 1785; on a third since the 27th January, 1786, and on the other third since the 28th July, of the same year, at the rate of five per cent., per annum, making the further sum of 1137 dollars. 2. For the sum of 1696 dollars, with interest at the rate of five per cent. per annum, since the 13th of July, 1821; being the further sum of 338 dollars, making in all the two sums and interest, the total amount of 3743 dollars; to be paid one-fourth by each of the defendants, with interest, until paid at the rate assigned.

It is further ordered, that the defendants pay the costs of the court below, and the defendants and appellee pay those in this court.

Dennis, for the plaintiff.

Derbigny, for the defendants.

Davenport's Heirs *v.* Fortier *et al.* IV, N. S. 72.

THIRD District.

A bill of exceptions left unexamined, it having been rendered unimportant by subsequent circumstances.

Flower *et al. v.* Arnaud. IV, N. S. 73.

A debtor, the claim on whom has been seized and sold, may retain against the purchaser whatever he might retain against his creditor before the sale.

The treasurer may withhold from a person, to whom the legislature has made an allowance, the amount of his taxes, for which the collector has reported him as a defaulter to the treasurer.

PARISH Court of New Orleans.

MARTIN, J., delivered the opinion of the court.

On the dissolution of the injunction, in this court, in the suit of Flower *et al. v.* Livingston, 2 *N. S.* 514, the plaintiffs took out an alias *fieri facias*, which was levied on "the right of the defendant to the sum of 800 dollars, which may now be, or hereafter may become due, by the state, &c., being part of a greater sum allowed him, by an act to fix the compensation to be allowed to the jurisconsults, appointed to revise and amend the Civil Code, &c. The plaintiffs became the last bidders for this right, at the sheriff's sale, and brought suit against the defendant, the treasurer of the state, who had refused to pay.

The answer denied the right of the courts of justice to seize moneys to be paid by him to individuals, and averred that he had paid out, and accounted for, all moneys due by the state to Livingston. That the sum appropriated to his payment was 4000 dollars, the payment of 800 dollars of which was deferred by law, till after the completion of the Code of Commerce. Leaving only 3200 dollars, now due, and of which 2000 dollars had been paid to Workman, on Livings-

ton's order, 379 dollars and 92 cents were due to the state for taxes, and an execution had issued to the sheriff, of the parish of Orleans therefor; 46 dollars and 12 cents for parish taxes; 344 dollars and 5 cents were due for taxes on Livingston's land, in the parish of Washita, for the years 1820, 1821, and 1822, and execution had issued therefor; 429 dollars and 91 cents had been paid (as the balance due) to the plaintiffs.

The parish judge allowed to the plaintiffs judgment for 46 dollars and 12 cents, and they appealed.

It seems the parish judge allowed all the items stated by the defendant, except the parish tax, which was not due to the state.

The sum paid to Workman is admitted to have been correctly paid.

The only difficulty is, as to the amount of Livingston's state taxes, for which execution was in the hands of the sheriffs of the parishes of Orleans and Washita.

We think that the treasurer had a right to detain from the present plaintiffs, the purchasers of Livingston's right, all which he might retain from the latter. It is clear, that if Livingston had called for the payment of the sum allowed him, the treasurer would have had the right of retaining those arrearages of taxes, the collection of which, it is the treasurer's duty to make, and the amount of taxes stated, is only that of those taxes, for which Livingston was reported as a delinquent, by the collectors, to the treasurer, in order that he might proceed to enforce payment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Christy, for the plaintiffs.

Preston, for the defendant.

Pilié *v.* Dreux's Syndics. IV, N. S. 75.

Freret *v.* Same. IV, N. S. 76.

FIRST District.

Same point as in Saulet *v.* Dreux's Syndics, 3 *N. S.* 615.

Williams *et al.* *v.* Spencer *et al.* IV, N. S. 77.

If a case, which ought to have been brought in the district court, is brought in the court of probates, where it is dismissed for want of jurisdiction, the district court, in affirming the judgment of the court of probates cannot pass on the merits of the case.

THIRD District.

MARTIN, J., delivered the opinion of the court.

This suit originated in the court of probates of East Feliciana, and the object of it was the partition of the estate of Rebecca Horton, the ancestor of all the parties. But the petition states, that the estate, consisting of real and personal property, is claimed by the defendants, under a written conveyance, which the plaintiffs allege was entered into without any consideration.

The answer denies the jurisdiction of the court of probates, and avers title in the defendants.

The court of probates sustained the plea to its jurisdiction, and dismissed the petition. The plaintiffs appealed to the district court, which affirmed the judgment, and they appealed to this court.

They rely on the act of the legislature of 1820, p. 92, and contend that after the affirming the judgment of the court of probates (if it was rightfully affirmed) the district court being seised of the case, ought to have passed on it, on the merits.

According to the plaintiff's own showing, the question, on which this case turns, is the insufficiency of the title under which the defendants claim. The title is the thing in dispute. The case was not, therefore, within the jurisdiction of the court of probates.

On the appeal, the district court was first to determine whether the judgment of the court of probates was correct, and if it appeared so, to affirm.

We do not think that in any case the appellate court can give any other judgment than the judge *a quo* could and ought to have given.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiffs.

Wickner *v.* Croghan. IV, N. S. 79.

A payment when not applied by the payor, must be imputed to the debt he had the greatest interest to discharge.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff states she sold the defendant a tract of land in April, 1818, for 8000 dollars, payable one-half on the 1st of January following, and one-half one year thereafter; and, in February, 1819, she sold him another tract, for 18,000 dollars, payable by equal instalments, in March, 1820 and 1821; that the defendant, at various periods, paid several sums, amounting in the aggregate to 20,641 dollars and 42 cents, with interest thereon down to April 4, 1823, when the parties came to a settlement, in which they agreed that 5358 dollars remained due, for which she received two promissory notes, bearing interest at ten per cent. per year, which remain unpaid.

On this she procured a writ of seizure and sale, on the first tract, for the price of which she had retained a special mortgage.

On motion of the defendant, she was ruled to show cause why the order should not be set aside; neither of the notes being shown to refer to the price of the tract. The rule was discharged and the plaintiff appealed.

We think the court erred. The payment of the price of the first tract was secured by a mortgage; that of the second was not.

The payments made by the defendant, must be first imputed to the first debt, as the one which he had the greatest interest to discharge, *i. e.*, that which was the most burthensome, being secured by mortgage, which was also the oldest. Civil Code, 290, art. 196.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the rule obtained by the defendant against the plaintiff be made absolute; and it is further ordered, that she pay costs in both courts.

Cuvillier, for the plaintiff.

Pierce, for the defendant.

Poutz *v.* Louisiana State Insurance Company.
IV, N. S. 80.

The march of French troops into Spain in 1823, was an act of war of France against Spain.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petitioner insured with the defendants a quantity of merchandise, on board the ship Adele, bound for Havre, on a premium of twelve per cent., on their estimated value, but subject to the condition that the insurers should return ten per cent., in case no act of war took place between France and Spain during the voyage.

The vessel reached Havre, the 17th of April, 1823, and on the 8th of the same month the French armies entered Spain.

The judge of the court of the first instance, decided in favor of the defendants. The petitioner appealed.

We are at a loss to conceive on what grounds it was expected this action could be maintained.

The policy of insurance does not make the return of a part of the premium depend on *a declaration of war*, but *an act of war*. The invasion of Spain by the French armies was most emphatically the latter. Its object was not merely to make war in the ordinary acceptation of the term, but to overthrow the government of the country. It was war against the constitutional and legitimate government of Spain, and it must have been in relation to that government the parties contracted. They did not intend to make their policy of insurance depend on the question who possessed *de jure* the sovereign authority of that country. Nor is it a question courts of justice can decide. They can only look to the government, which is recognised by their own. That established in Spain, at the period of the invasion by the French, was considered by the government of the United States, as representing the nation. An invasion, to destroy that government, must be considered an act of war against the state it represented; nor can it change the character of the act, that the French were secretly invited by the king to destroy the liberties of his country, and restore him to absolute power; until they succeeded, they were making war against the nation, because they were making war against the authorities constituted by that nation, and which authorities formed, at that time, its government. Had the patriots of Spain succeeded in repelling that invasion, and maintained the form of

government they had established, there can be no doubt war would have existed between the two countries. Their failure cannot change the nature of the act. It must be tested by the situation of the contending parties, at the time the contest commenced, and while it continued, and not by their position after. There was no civil war in Spain, when France invaded it. There was not two parties contending by arms for the government. There was but one, that, which the French armies overthrew, and until they succeeded, they warred against the nation, because they warred against those who represented it. 3 Wheaton, 639.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Grymes and *Eustis*, for the plaintiff.

Workman, for the defendants.

Montillet *v.* Shiff. IV, N. S. 83.

If a bet be made on the election of governor of Louisiana, to be determined by the return of all the parishes in the state, and two parishes make no return, the bet is drawn.

PARISH Court of New Orleans.

MATHEWS, J., delivered the opinion of the court.

This is a suit brought by the depositor against the depositee, or stakeholder of 1000 dollars, which he alleges were placed in the hands of the latter, without stating for what purpose; but claims a right to recover back the amount. The answer of the defendant admits the deposit, states the cause of it, being a wager between the plaintiff and one Hamlet, depending on the respective number of votes that J. Villeré and B. Marigny, should obtain from the people of the state, as candidates in opposition for the office of governor, at the election; Hamlet betted on Villeré and the plaintiff on Marigny; and that the bet being determined by the returns of the votes to the legislature in favor of the former, he paid to him the amount thereof, in pursuance of the deposit.

The defendant obtained judgment, in the court below, from which the plaintiff appealed.

The appellant, by his counsel contends, that according to the terms of the wager (which was reduced to writing,) it has not been decided;

and from accidents, not within the control of either of the parties, never can be determined; and that consequently the aleatory contract has become null and void, or, in wagering language, it stands as a drawn bet, and each party has a right to withdraw his stake. The correctness of these propositions, on the part of the plaintiff, depends much on the true meaning of the last stipulation in the contract. If it must be so construed, as to show clearly the intention of the parties was, not to submit to any other calculation of the amount of votes, which each canditate obtained from the people, but that which should be made according to the official returns, from the whole state, we are of opinion that the appellant ought to succeed in his action, because the statement of facts shows that no returns were made from two of the parishes of the state. The agreement is written in the French language, and that clause of it, on which the rights of the parties mainly rest, is expressed in the following terms: "*Bien entendu que cela s'entendra dans tout l'etat, et d'apres les rapports qui seront faits.*" In the construction or interpretation of laws, or contracts, a primary rule is, that effect, if possible, should be given to the whole context, and that every provision should be enforced to the full extent, unless such interpretation would lead to absurdity and nonsense.

In the present case, the parties made their bet on the number of votes, which should be given to the two candidates throughout the whole extent of the state, according to the official returns. But official returns were not made from all the election districts, and therefore the bet was not and could not be determined, unless we suffer the latter part of the clause of the contract, so to control the first as to render it null and of no effect, and subject the bet to be determined by the returns actually made. This we think would violate all rules of fair construction. The returns, which were made in conformity with the constitution and laws of the state, were sufficient to place Mr. Villeré on the list of those, who were to be finally voted for by the legislature, and he might have been made governor of the state.

But from the whole contract between the parties to the present suit, in relation to their bet, it is clearly seen that they did not choose to subject its decision to the same accidents, in the official returns, which must have exhibited either one or other of the candidates to the legislature, as having the greatest number of votes. Their wager has not yet been determined, and the stakeholder has paid it over in error. Whether it may yet be decided is questionable; but it is a question not required to be settled in the present case. Before concluding it is, however, proper for us to state, that the plaintiff is not in the situation of a loser, who has voluntarily paid; on the contrary, the money has been delivered to the supposed winner, by the stakeholder, contrary to the will and intention of the appellant: consequently the appellee cannot with any propriety or justice invoke that part of the Code which refuses an action to a person, who has lost and paid money on an illegal bet.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant and appellee, 1000 dollars, with interest at the rate of 5 per cent. per annum from the judicial demand, and costs in both courts.

Dennis, for the plaintiff.

Grymes, for the defendant.

Louisiana Bank *v.* Ellery. IV, N. S. 87.

FIRST District.

Held, if an attorney in fact has no special power to receive notice, the notice of a protest cannot be properly given him.

Richards *et al.* *v.* Morgan. IV, N. S. 89.

PARISH Court of New Orleans.

No appeal lies from a judgment given against a sheriff, on account of his having taken insufficient bail when less than 300 dollars is claimed from him, although more was demanded from the defendant in the original suit.

Dubreuil *v.* Soulié. IV, N. S. 91.

THIRD District.

If the party who, on a *fi. fa.* points out property as belonging to the defendant, and becomes the last bidder, he cannot have an injunction, on the ground that the property belonged to another, and so he acquired no title.

Dubreuil *v.* Soulié. IV, N. S. 93.

THIRD District.

The sheriff's vendee cannot have an injunction because his deed is not in the form prescribed by law.

EASTERN DISTRICT, DECEMBER TERM, 1825.*

Mark *v.* Bowers. IV, N. S. 95.

If goods are sent to commission merchants, and they hand them over to a third person for sale without the order of the principal, they are responsible.
Novation must be expressed, or clearly established.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action was brought against the defendant as one of the partners of the late firm of Talcott & Bowers, and his responsibility is alleged to have arisen from a consignment of whiskey made to the firm, and sold by Talcott after the dissolution of the partnership, in the discharge of his duty of liquidator of the affairs of the firm.

The answer admits the partnership, the receipt of the property by Talcott, and its sale as alleged in the petition; but denies that the defendant is liable, because the plaintiff was informed of the dissolution of the firm, and of his property being placed in the hands of Talcott, and that, with a knowledge of this fact, he recognised him as his, the plaintiff's agent, and considered him alone as his debtor.

There is a further plea that the plaintiff suffered Talcott to retain

* There were no cases decided in the Western District this year, in consequence of the indisposition of two of the judges.

the money in his hands until he failed, viz: for the space of eighteen months, and also that he gave directions to Talcott alone, and in his individual capacity, as to the disposal of the funds proceeding from the sale.

The partnership was dissolved on the 28th of January, 1822, and in the notice of the dissolution, it was stated that Talcott was fully authorised to settle the affairs of the concern.

A copy of this notice was inclosed to the plaintiff by Talcott, who stated that he should, in future, transact business in his own name. And on the same day he writes to plaintiff another letter, that the late firm of Talcott & Bowers had received, a few days since, twenty-nine barrels of whiskey on his account, and that he, Talcott, had made sales of it at thirty cents.

There was another lot of whiskey which did not reach the hands of Talcott until the 7th of March, but both parcels were shipped before notice of the dissolution of the partnership reached the plaintiff.

On these facts, two questions of law arise:

1. Whether the firm of Talcott & Bowers, was responsible to the plaintiff?

2. And if it was, has that responsibility been released or discharged?

I. The goods being shipped to Talcott & Bowers, before notice of the dissolution of the partnership was received by the plaintiff, we think there can be no doubt, it was their duty to sell them as directed, or hold them subject to any ulterior disposition the plaintiff might make of them. And it is very clear to us, that if they sold them, either through the agency of a member of the firm, or by that of a third person, before they received directions so to do, they were responsible to the same extent as if they had made the sales themselves. The confidence reposed was personal, and the principal had the right to designate his own agents, in case those he selected in the first instance were unable to act.

II. The responsibility being thus in our opinion once fixed, the remaining question is, has it been discharged, or in other words, has novation taken place? This point is still clearer than that just decided. Nothing in the record enables us to decide, the plaintiff ever intended to release the partnership from their responsibility. The expressions used in his letter, acknowledging the receipt of the account sales, if taken alone, would raise a presumption of that kind; but that presumption is much weakened by the fact of Talcott being charged with the settlement of the partnership affairs, and the evidence leaving it quite doubtful whether the plaintiff corresponded with him in that capacity, or in his individual character. Admitting, however, the inference to be that it was in the latter, it does not enable us to say there was novation, for that must be express, or so clearly result from the proof, that not a doubt can exist in regard to it. Civil Code, 296, 174; 9 *Martin*, 268; *Ibid. N. S.* 144.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Strawbridge, for the plaintiff.

Pierce, for the defendant.

Moosa *v.* Allain. IV, N. S. 99.

FOURTH District.

Decided, where a slave is directed by the will of the master to be set free, the purchaser of him before the time arrives, has a right to the slave's labor wherever he chooses to have it performed: *Quære*, whether he may carry him out of this state? Perhaps, the slave may be allowed the aid of the magistrate, in case of an evident attempt to transport him out of the jurisdiction of the state, in order to frustrate his hope of emancipation, under the will and sale, by compelling the purchaser to give security for the forthcoming of the slave, in due time, or otherwise.

In the present case there is no evidence of even an intention of the defendant, Leblanc, to transport the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Davezac, for the plaintiff.

Eustis, for the defendant.

Goodwin *v.* Chesneau *et al.* IV, N. S. 103.

COURT of Probates of New Orleans.

Held, a party who has made a cession of his goods loses the capacity to stand in judgment.

EASTERN DISTRICT, JANUARY TERM, 1826.

Findley *v.* Breedlove, Bradford & Robeson.
IV, N. S. 105.

The party in whom the *legal* title is vested, has the right to sue.

Partnership debts cannot be compensated by a demand against an individual member of the firm.

Damages on the warranty of goods sold, is not confined to the price of them.

When the agent exceeds his authority, the principal may set the contract aside, but he cannot enforce it, according to his instructions to the agent.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action was commenced to recover the amount of three several bills of exchange, drawn by the house of William Greene & Co., of Cincinnati, on the defendants, and accepted by them.

These bills appear to have been for the balance due for a steam engine furnished by the drawers, to the present defendants; and, it being admitted that the plaintiff is a partner in the house of William Greene & Co., the same defence has been made, and received without opposition to the payment of these drafts, as could have been offered against the firm who drew them.

This defence consists mainly in an allegation, that there was a failure of consideration for the bills; that the defendants never received value for them; that the engine made by Greene & Co. for

[Findley v. Breedlove, Bradford & Robeson.]

the steamboat Tennessee, was warranted by them to be of good workmanship, but that the same was defective and imperfect, and that the defendants were put to great trouble and expense to repair it.

To this defence against the plaintiff's right of recovery, the defendants, in a supplemental answer, afterwards added a demand in reconvention, grounded on the damages they allege they sustained by the defective engine put on board the boat by the house of Greene & Co.

The judgment of the inferior court was in favor of the plaintiff, and the defendants appealed.

The record comes up loaded with a mass of testimony, taken by the parties in support of their respective allegations: before we can approach it, several important questions of law have to be disposed of.

The first presented by the pleadings is, the plaintiff's right to sue. The answer alleges that Findley gave no valuable consideration, for the drafts, and that he is a partner in the house of Greene & Co. This point has been more than once made in this court, and always without success. The person, who on the face of the bill has the legal title to receive its contents, has the right to sue for them. Whether there be, or not, other persons who have an equitable interest to the proceeds, is a question with which the defendant has nothing to do, unless the assignment is made to deprive him of a defence which he would have had against the person who transferred it. In the instance before us, nothing of that kind appears, and the appellants have had the benefit of every objection which they could have made, had the persons from whom the original consideration moved, sued them. See the cases of Banks *v.* Eastin, 3 *N. S.* 291; and Shaw *et al. v.* Thompson, *Ibid.* 392.

The next comes from the plaintiff, and contests the right of the defendants to plead in reconvention, because the agreement for an engine under which the claim for damages is made, was originally entered into with the defendants, and Robertson & Hill of Nashville. On this head we have been referred to *Toullier, Vol.* 7, in the chapter in which he treats of compensation and reconvention. This author lays down the general principle, that debts which are offered in compensation must be personal, and that partnership debts cannot be compensated by demands against an individual member of the firm. This doctrine is recognised by the court as sound, but its application against the defendants, in the present case, we are unable to admit. Supposing the parties here, to be all bound *in solido;* the defendants and Robertson & Hill, who purchased, and the plaintiffs, who sold; if the defendants now before the court, are selected as those from whom the whole amount of the engine is to be paid, they should certainly have the right, in the hypothesis just put, of their being responsible *in solido,* to offer the whole claim which belongs to the firm

as a defence. This is not pleading private debts against a partnership demand, but partnership debts against partnership claims.

But admitting the responsibility of the defendants to be limited to their virile share, they have the right to set up the same proportion of their interest in the engine in reconvention. Were it otherwise, the plaintiffs by suing them separately, could totally defeat a right which it is not denied they might exercise collectively.

This brings us to the most important point in the cause. The plaintiff contends that all claims which the defendants had against the house of Green & Co., in consequence of the defective engine originally put on board the Tennessee steamboat, were settled finally by the parties in the year 1820.

This is entirely a question of fact, unless the position assumed by one of the plaintiff's counsel be correct; namely, that the warranty of the makers of the engine only extended to replacing those parts which were ascertained to be defective.

The contract for the purchase of the engine, contains an engagement on the part of the makers; "That the engine and all the machinery, necessarily connected therewith, shall be of a good quality; that it shall be executed in a complete workmanlike manner; that when completed and put on board, it shall propel a boat as fast as the average of ten of the swiftest running boats which are running on the western waters."

There is nothing in this warranty that limits the responsibility of the sellers to the value of the machinery which should prove defective and the law extends the obligation much further. Damages are the loss which a person has sustained, or the gain which he has missed: such is the definition of the Roman jurists, "*quantum mea interfuit id est quantum mihi abest, quantumque lucrari potui. Dig.* 46, *tit.* 8, *l.* 13. In practice, this right is restrained to such injury or damage as is the direct and immediate consequence of the failure of the contract. The writers on the civil law, illustrate this rule by many examples which it is unnecessary to notice. We think that, where the owner of a boat contracts for an engine, and loses the use of her for several months in consequence of defects in the machinery, the money actually expended, and the loss of gain directly resulting from these defects, come within the definition just given. *Pothier, Traité des Ob.* 162, 163, 165; *Toullier, Droit Civil Français, liv.* 3, *tit.* 3, *chap.* 3, *nos.* 286, 287; *Domat, liv.* 3, *tit.* 5, *sect.* 2; *nos.* 4 and 11; Civil Code, 49, 50, 51, p. 268.

Whether there was not a waiver of these damages by an acceptance of machinery to replace that part which was proved defective, is, as we have already stated, the most important question in the cause; our opinion on it will be best understood, by stating somewhat in detail, the evidence by which it is contended, this accord and satisfaction is established.

The most important testimony in support of the plaintiff's pretensions on this point, and that on which the judge below decided the

cause, is contained in the deposition of one Anthony Defrées, a clerk of the plaintiff. This witness states, that Breedlove, Bradford & Robeson, owners of the steamboat Tennessee, sent their engineer Grigg, to Cincinnati, for the purpose of adjusting their claim to damages, for the defective engine originally put on board by Greene & Co. That deponent saw a letter of instruction from the defendants to Grigg, by which they authorised him to claim from Greene & Co., such articles as he conceived to be deficient in the engine, and to receive them in full satisfaction of their claim for damages. That accordingly all the articles required by him were furnished, amounting to 1250 dollars, and that they were delivered and accepted, on the express agreement, that the same should be in full satisfaction for all claims against Greene & Co. for damages.

Other witnesses testify, that they heard Grigg say he had such a letter as that stated by Defrées, and that he had received the articles mentioned, in full satisfaction of the defendants' claim.

This testimony has been objected to, because the loss of the letter is not sufficiently accounted for, to authorise the introduction of parol evidence.

This objection, it appears to us, cannot be supported. The writing never was in the possession of the plaintiff; it remained in the hands of the defendants' agent, and diligent search appears to have been made for it among his papers, since his death.

There is much more difficulty in the other ground taken, that the witness has not stated what is true, or that he is mistaken in his recollection of the facts to which he testifies. After due and careful examination of the different proofs which the record exhibits, we feel it impossible to reconcile the witness's testimony with the written evidence, and that evidence too, introduced by the plaintiff himself.

Giving that testimony, however, credit as far as it goes, until met by the written documents, and supposing it true that Grigg did go up with authority from Breedlove, Bradford & Robeson, to select machinery, and release Greene & Co. from all further responsibility for damages, it is clear to us that they did not conceive him authorised, to make such an agreement, and that if they did, they did not close with his proposals, if any such were made. This we think manifest from the following receipt, taken at the time the articles were delivered.

"Received of Wm. Greene & Co., in good order, the several articles specified in the foregoing bill, for Messrs. Breedlove, Bradford & Robeson, which I engage to deliver to them, the dangers of the river only excepted. Provided they have paid, or shall pay, their acceptances of William Greene & Co's. draft for 1532 dollars, due on or about the 28th of September last, and shall pay or give new acceptances at 60 and 90 days, for the amount due on two other acceptances of theirs in favor of the said William Greene & Co. which have been returned from New Orleans under protest; a statement of which amount they have been furnished with—provided the articles shall

not be received by the above named firm, they are to be deposited with Messrs. Thomas F. Townsley & Co. at New Orleans.

(Signed,) E. GRIGGS."

Now so far from this receipt supporting the statement of the witness, that these articles were delivered to Grigg, as agent for Breedlove, Bradford & Robeson, and received by him in full satisfaction of their claim against Greene & Co., the very reverse is established by it. It shows that these articles were not received as the property of Breedlove, Bradford & Robeson, but as that of Greene & Co. The person receiving, engages not to deliver them, unless the former accede to certain conditions; and he promises to hand them over to another house in case these conditions are not complied with. It is clear then that neither Greene & Co. nor Grigg, considered any thing settled by the delivery of these articles. The authority of the latter was either not recognised, or if it was, he and Greene & Co. could not agree on the terms. The words of the receipt establish, that Grigg was constituted by Greene & Co., *their agent*, to make propositions, to the defendants, and that if they accept them, he was to deliver the machinery, if not, he was to hand it over to Thomas F. Townsley & Co.

That he acted incautiously, or not in good faith, in delivering the articles in question, without obtaining a compliance of these conditions, on which he was authorised to deliver them, there can be no doubt: what effect the receipt of them should have on the defendants' claim, is the next point to which our attention must be directed.

It is one of no difficulty. When the agent exceeds his authority, and the party dealing with him knows that he does so, the contract is void, and the principal can set it aside; but he cannot claim, it should be enforced according to the instructions given to his attorney in fact, for the assent of the other party is wanting to the agreement.

In the present case, there is no proof that Grigg ever communicated to the defendants the conditions on which he was authorised to deliver the machinery. Admitting the presumption to be that he did, the bringing this action on the old bills, is sufficient evidence these conditions were not acceded to.

On the whole, we are satisfied the defendants have not in law, lost their right to set up a claim, which appears to us supported by the strongest equity.

The cause must be remanded in order that the damages be ascertained. 2 *Martin's Dig.* 10.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the cause be remanded for a new trial, and that the appellee pay the costs of the appeal.

Whittelsey, for the plaintiff.

M'Caleb, for the defendants.

Morgan *v.* Furst *et al.* IV, N. S. 116.

FIRST District.

If property attached, be released on bond, they who give the bond cannot afterwards plead that the sheriff had no right in the goods.

In whatever way a man appears to bind himself he is bound.

Copell *v.* Dalton. IV, N. S. 123.

PARISH Court of New Orleans.

In this case, the curator of one Whiting's succession sued to recover a slave as having been the property of Whiting. Defendant pleaded title in himself derived from Whiting through an agent of his; also title from the agent, Cleveland, himself, as equitable owner of the slave. The court found that this agent had lost his authority to sell for Whiting, by W.'s death before the sale. To prove the equitable right of Cleveland while the title was in Whiting, parol proof was introduced. The Court said: parol proof cannot be legally admitted to prove the alleged simulation of the act of sale to Whiting. See 2 *N. S.* 452; *Ibid.* 13. Judgment for plaintiff.

Laporte *v.* Landry. IV, N. S. 125.

SECOND District.

Held, a certificate of protest is bad, if it states that notice was put into "the post-office," without saying into *what* post-office. The statute under which the right of establishing the responsibility of endorsers by the certificate of a notary public is claimed, makes a great change in the rules of evidence; and those who claim the benefit of it must take care, and bring themselves strictly within its provisions. Acts of 1821, 44; Fougard *v.* Tourregard, 3 *N. S.* 464.

Held, that waiver of notice must be *express* and cannot be inferred. Chitty on Bills, ed. 1821, 309; 5 Johns. 375; 12 *Ibid.* 423.

Richardson *v.* Debruys & Longer. IV, N. S. 127.

FIRST District.

This was chiefly a case of practice. The COURT say:

The first points to which our attention has been directed, are presented by bills of exceptions.

On the day the cause stood for trial, the 19th of April, one of the defendants filed an affidavit for a continuance, which stated that on the 21st of March, then last past, he had forwarded a commission to Woodville, in the state of Mississippi, which was not returned. The affidavit contained the usual averments, that the testimony expected under this commission, was material, that it was expected daily, and that the application was not made for delay.

The cause had been at issue three years, when this application was made, and under all the circumstances, we are unable to say the court below acted erroneously, in refusing it. No explanation is furnished, why the defendants delayed so long in procuring testimony, which might have been so easily had at an earlier period.

They renewed the application on another affidavit, that they could not go safely to trial without the benefit of the testimony of Benoit, their co-defendant. But the judge most correctly refused it; for, even

admitting the witness was competent, the affidavit neither states that due diligence had been used to procure his attendance; that the application was not made for delay, nor that the defendants expected to get his testimony at any other time. See the cases of Lafon's Ex'rs *v.* Gravier *et al.*, 1 *N. S.* 245, and Allard *et al. v.* Lobau, 3 *N. S.* 295.

The third and last bill of exceptions, was taken to the opinion of the judge permitting the plaintiff to examine a witness after the parties had closed their evidence, and the defendant's counsel had opened his defence, by reading his answer to the jury. The witness examined, had been summoned, and attached at the instance of the defendants, and came into court after the other testimony in the cause had been heard.

We think the judge exercised his discretion soundly in admitting the witness. No general rule can be established in regard to matters of this kind; much must depend on the particular circumstances of the case.

Held, also, that whosoever holds himself out to the world as partner in a commercial firm cannot be permitted to escape from the responsibility he has incurred by that declaration, though he be not in fact a partner.

Randall *v.* Bayon. IV, N. S. 132.

SECOND District.

Applications for new trials are addressed to the sound discretion of the court below.

Davis *et al. v.* Taylor. IV, N. S. 134.

PARISH Court of New Orleans.

Held, if A recover money for the use of B, it cannot be attached as the funds of A.

Litchworth *et al. v.* Bartells *et al.* IV, N. S. 136.

EIGHTH District.

This was an action of trespass relating to land in which the respective titles of the parties were brought into view. The defendants offered in evidence a survey of part of the disputed premises, alleged to have been made by the authority of the Spanish government as then exercised in Louisiana. The plat is certified by Carlos Trudeau, the surveyor-general of the province, as having been executed by one of his deputies since the change of government, and the opening of the land-office under the authority of the United States; this plan of survey was regularly registered, and a certificate obtained from the commissioners in favor of the person claiming under it. They have, therefore, for and on the part of the United States, recognised it as evidence of title and in strict conformity with the act of Congress, 3d March, 1819. The legal effect it may have in opposition to plaintiff's evidence of title, remains to be considered after its introduction. Meanwhile, it is considered that the court below erred in rejecting this plat when offered in evidence: cause remanded with instructions to admit the plat offered by defendants in evidence.

In petition plaintiff claims for a trespass, founding his right to maintain that action on his actual possession, legal and peaceable. He was allowed to file a supplemental petition, setting forth the manner of possession and title under which he holds.

Held, it was not error in the judge *à quo* to permit the filing of this: it did not change the substance of the demand.

Le Breton *v.* Morgan. IV, N. S. 138.

A law imposing a tax on a particular parish, the object of which is the payment of a debt due by the state, is not unconstitutional.

The judiciary possess the power to declare laws, contrary to the constitution, void.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

This suit commenced by an application for an injunction to prohibit the defendant, sheriff of the parish of New Orleans, from selling a slave of the plaintiff's, which he had seized for the payment of taxes, alleged to be due to the state.

As the petition not only states the facts on which this application was made, but contains, in a condensed form, the strongest grounds by which it was supported on the argument, we deem it proper to set it out as written.

"Your petitioner represents that part of the taxes, viz., the additional tax imposed by the treasurer of the state, on the inhabitants of the parish of Orleans, by virtue of, and in compliance with an act, entitled, 'An act to grant relief to Lucy B. Holland, widow of Francis Holland, deceased,' passed on the 18th of March, 1820, has been imposed on the said parish to procure the reimbursement of certain expenses, incurred by the governor of the state for certain works, which, without any authority to that effect, he had ordered to be done, to stop a crevasse which had broken in, on the plantation of Barthelemy Macarty, in the said parish, in the spring of the year 1816; which work, independent of being ordered by a person who was not invested by law with any power to that purpose, was ill-judged, extravagant and turned to be of no utility to the parish; that the law thus awarding the payment of such expenses, to be made by a particular portion of the community is an *ex post facto* law, and an encroachment upon the rights of another branch of the government: viz., the judiciary whose province it was to decide if the individual who had, without any authorisation, incurred these expenses was entitled to a reimbursement of them, and if so, by whom that reimbursement was to be made: that consequently, the said law is unconstitutional, and not obligatory upon the citizens."

The counsel for the plaintiff, on the argument of the cause, went at some length into the question, whether this court had the power to pronounce an act of the legislature, unconstitutional. Were the question doubtful, the authorities he read might well be considered as settling it: but any reference to them, to support the position as-

sumed, was unnecessary in this court. It is a subject on which we never had a doubt, nor have any at this moment. We have, already more than once, found it our duty to express our convictions on this point. The right, nay, the necessity of the judiciary exercising this power, is so inevitably the consequence of our living under a government of laws; of the constitution or form of that government being the supreme law of the land; and of that constitution containing an express provision, that all laws made by the legislature, contrary to it, *are null and void;* that the mere statement of the premises, carries the mind at once, to the conclusion; and we feel that it is one of those self-evident propositions, which requires no aid from argument, and can receive none from authority. 3 *Mart.* 12, 352; 3 *N. S.* 472.

Conceiving it, therefore, clear, that an act which the constitution declares to be *null and void*, cannot have *force and effect* given to it by the judiciary, we proceed to examine, whether the enactment, of which the plaintiff complains, be of that nature.

The prohibition in the constitution, against the passage of *ex post facto* laws, applies exclusively to penal, or criminal cases. Such is the construction of these words in the constitution of the United States, antecedent to the formation of the government of Louisiana, and we have no reason to doubt they were used, in their then ascertained and technical meaning, by the convention of this state. 3 Dallas, 386; 4 *Ibid.* 14; 7 Johnson, 488; 1 Blackstone's Com. 46.

The constitution of this state having affixed no limits to the exercise of the power of taxation by the legislature, it is difficult to suppose even a case, in which the exercise of that power could be considered unconstitutional, or properly become the subject of judicial interference. The only objections that can be made to acts raising revenue is their inexpediency, or injustice, and both these are exclusively for the consideration of those with whom the constitution has deposited this power. We are unable, notwithstanding the argument at the bar, to discover any strength in the position; that in the passage of this law, the legislature trenched on, and invaded the functions of the judiciary. Had, indeed, the legislature declared that, according to the laws in force, A, B or C, should pay the individual by whom these services were rendered, another question would have been presented for our consideration. But this is what they have not done. They have passed a law in the exercise of a power which is exclusively theirs, to raise a revenue out of which he shall be paid, and the circumstance of there not being any previous law which would authorise this payment, can furnish no ground to declare it unconstitutional. If it did, the same objection would apply to every act of the general assembly to raise money for the discharge of any just claim on the government. The legislature had as much right to direct that the money to be paid this individual, should be raised by a new tax, as they had to order the payment out of any moneys unappropriated in the treasury; and they had the same right to order

it to be paid by a tax on the parish of New Orleans, as they had to levy it off the whole state; for there is nothing in the constitution which declares that taxation must be uniform. If the motives which induced the legislature to pass laws of this kind, were sufficient to render them unconstitutional, there is scarcely one of their acts to raise money, that would not be void. These motives are not always avowed, but we know, in point of fact, that taxation is as often resorted to, to pay those to whom the state is indebted, or whom it may desire to remunerate for services rendered, as to create a fund out of which future obligations are to be discharged. In all these cases it might be said, with the same truth and force as in the present: go to the judiciary if there be any law to pay you; and if there is not, the legislature cannot come to your relief, because in doing so, they decide that the whole, or a part of the state must pay. The legislature certainly exercise their judgment, in deciding what taxes shall be levied, by whom they shall be paid, and how they shall be applied, but they touch not the authority of the judiciary in doing so. All these powers are by the constitution exclusively and wisely confided to the representatives of the people.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Derbigny, for the plaintiff.

Preston, for the defendant.

Nolan *v.* Rogers. IV, N. S. 145.

FOURTH District.

Decided, the usage which has uniformly prevailed among attorneys at law to collect money for a certain per centage, either by receiving it for their clients, before suit commenced, or after judgment, is tolerated by the laws of the state, which prescribe their duties and establish their rights and privileges, and that their receipts and acquittances are binding on the persons who may have employed them. But this authority, thus derived from usage and the law, ought not to be extended beyond the simple receipt of money, or things which are ordinarily taken in payment of debts, such as bank notes of a bank in good credit, and checks on similar banks. There is something of impropriety on the part of a debtor who attempts to induce an attorney at law to receive for his client, in

payment, any thing but money, as that is the only medium by which payments of debts, strictly speaking can be made; to discharge them in any other way must be done by a kind of barter, which is not within the scope of the legal power of licensed attorneys.

Montamat and Wife *v.* Debon. IV, N. S. 147.

FIRST District.

IN this case, the plaintiffs alleged that Cottin, during his marriage with the present Mrs. Montamat, made a donation to her of a house and lot, and at his death, the defendant, his executor and her father possessed himself of them, as she believed, to administer them for her, and has ever since possessed and retained them, without right; farther, that besides she has an interest in them, as common in goods with her late husband, as they were purchased during the coverture. The petition concludes with a prayer for the possession and fruits.

The defendant pleaded the general issue, and, in an amended answer, title in himself, under Cottin, senior, and the reducibility of the donation. Cottin, senior, having died, the defendant cited his heirs in warranty; they pleaded the reducibility of the donation, its simulation, the want of its registry, and the assent of the plaintiffs to the sale to the defendant.

There was judgment against the plaintiffs, and they appealed.

The COURT said:—The objection to the call of the heirs in warranty, if there be no donation, needs not to be examined. It is true they alone pleaded the simulation, but we are of opinion, that a simulated act, being no act, the simulation, establishing that there is no act, may be given in evidence under the general issue, especially if the evidence be not objected to; perhaps the objection to the evidence would authorise a new trial only, if the party averred he was taken by surprise.

The simulation we think clearly results from the testimony of Gurley and Guillot. They were the sons-in-law of the defendant's wife only; and according to the decision of this court, in the case of Bernard *et al. v.* Vignaud, a father and son-in-law, do not stand in the relation of ascendants and descendants. The wife's contre letter, though she be a minor, can bind her as a part of the *res gesta.*

[Montamat and Wife v. Debon.]

As the plaintiffs could not sell the dotal estate, it could not pass by a tacit consent.

There being no donation, the title of the plaintiffs rests only the right on the premises on an acquisition made during marriage. Cottin brought 30,000 dollars in marriage, a few weeks after he purchased the premises. His wife did not bring a cent; the presumption is very strong that he bought with the money he brought in. Still she may have a claim on the premises as part of the *gananciales*, but of this there is no evidence, for the estate is unliquidated.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Derbigny, for the plaintiffs.

Mazureau, for the defendant.

Balfour v. Chew. IV, N. S. 154.

Parol evidence cannot be received from a purchaser at sheriff's sale, to show the property was worth less than the conveyance expresses he was to give for it.

A promise to release a mortgage, is not a release of it.

Unless property sold by a sheriff brings more than the amount of the previous mortgages, there is no sale.

A bid at a sheriff's sale, is a bid for the absolute value, and when it is incumbered, is not a bid over and above the incumbrances.

But this bid may be made for the entire value, with the obligation to pay the mortgage; or for the value above the mortgage, subject to the prior incumbrance.

Selling the land as subject to a mortgage, does not make the purchaser personally liable.

THIRD District.

PORTER, J., delivered the opinion of the court.

The proceedings in this case have arisen out of an order of seizure and sale, obtained by the defendant Chew against Balfour. The latter applied for an injunction, which was granted; and on hearing, made perpetual. The defendant appealed.

The principal ground on which the prayer for an injunction rested, was a previous sale of the plaintiff's property, under a former order of seizure and sale. The purchaser at that sale, conceiving his rights to be affected by the matters at issue between the plaintiff

and defendant, asked and obtained leave to intervene; and the judgment being as unfavorable to his pretensions as that of the defendant he also appealed.

The case comes up on two records, but they have been argued together in this court, and they do not appear to require a separate consideration.

To set out at length the various documents introduced in evidence on the trial below, would impede, rather than promote, a clear understanding of the case.

In the month of November, 1820, the plaintiff in injunction (Balfour) purchased of the defendant a tract of land for the sum of 10,800 dollars, payable in three instalments, and gave his notes, with mortgage, to secure the purchase-money.

At the time the sale was made, the land was subject to a mortgage in favor of one Charles G. Johnson, who had sold the premises to the person from whom the defendant purchased it. Johnson became a party to the act between plaintiff and defendant; and declared, that on Balfour's payment to Chew of the purchase-money, he, Johnson, would release and cancel his mortgage.

Partial payments were made in pursuance of this contract, but Balfour being unable to fully comply with it, came under another obligation to Chew, on the 24th of April, 1823, by which he acknowledged to owe 5116 dollars: viz. 1866 for balance of the first instalment, and 3240 dollars for the second. For these sums he gave his notes, and an additional mortgage on seven negroes.

These notes were transferred to William G. Johnson, by blank endorsement, and the application for an order of seizure and sale, was made by Chew, for the use of the transferee.

The execution which the court has enjoined, is the second execution issued on this mortgage. The proceedings which took place on the first, are the source of all the difficulties the cause presents. The plaintiff insists that in consequence of that sale, he is entitled to a credit of 9450 dollars; the defendant contends it is only 3450 dollars.

This difference of 6000 dollars, in the pretensions of the parties, arises from the land being sold subject to a mortgage for 6000 dollars, for which the defendant Chew, the vendor, was responsible, he having conveyed with warranty. The plaintiff asserts, that as his property sold for that amount less than it would have done had the mortgage not existed, he is entitled to set it up against any balance that may be due to his vendor.

If the facts should be found such as he has alleged, and the legal consequences he deduces from the sale, are correct to the extent relied on, we have no doubt of his right to offer the claim against any other, the defendant may have against him; and that the plaintiff in execution, has no right to proceed to make money on a judgment, which would have been satisfied at the first forced sale under it, had it not been for an existing incumbrance for which he was responsible.

The petition sets out the circumstances in detail, of which a condensed statement has been just given.

The answer of the defendant avers:

That taking the facts as true, the plaintiff has not shown any equity;

That Balfour, at the time he made the purchase, was informed of the mortgage in favor of Johnson, and that Johnson joined in the sale, and agreed to cancel the mortgage, on the plaintiff paying the sum of 10,480 dollars, which he has failed to do;

And, that the facts alleged are untrue.

The petition of the interpleader Chinn states:

That he was the purchaser at sheriff's sale, and that the allegations in the petition would subject him to the payment of a large sum of money above the amount which he conceived he was giving for the property.

That at the time of the sale, William G. Johnson had obtained by transfer, and was the real owner of the mortgage debt of Charles G. Johnson and of E. R. Chew, and the money collected was to be applied to extinguish the original debt due to Charles G. Johnson; that this was well known to Balfour.

That the bid of the petitioner was the absolute value of the property, and was so considered by all parties, and not for the surplus value, over and above the amount of the first mortgage.

That the amount of the petitioner's bond was improperly applied to the junior mortgage, and that being given in error, it should be cancelled, or imputed to the first mortgage.

That the petitioner has become holder and owner of all the mortgages, since filing the petition of injunction, and is entitled to receive their proceeds.

The first question necessary to be examined, is the correctness of the opinion of the court below, refusing to hear parol testimony that the land was worth no more than the sum at which the intervener stated he bought it.

If this proof would have shown the price to be different from that which the written evidence establishes, it was illegal; if the same, it was unnecessary. No ground has been presented for a departure in this instance from the general rule, except an averment that there was error, or in other words, that the parol evidence would prove the transaction to be different, from that which it is shown to be by the written. Now it is obvious, that if the mere allegation, that the facts are different from those which the written documents import, be sufficient to authorise the introduction of inferior testimony, the rule ceases to have any effect; for that allegation could be made in every case, and of necessity must be made in all, or it would be idle to contradict the written proof. But it was to guard against the danger of admitting such evidence, on such allegations, that, we understand, was the reason which induced the legislature to prohibit this species of proof.

It is contended, both by the defendant and interpleader, that the

mortgage for 6000 dollars, which the plaintiff in injunction insists his land was sold subject to, did not exist; that it was merged in that given by the latter when he sold his land, and consequently he is not entitled to credit for it against the defendant.

The correctness of this position will be best ascertained, by a reference to the instrument by which this merger is said to be produced.

It is the deed of conveyance by which the defendant sold to the plaintiff the land which was the consideration of the debt sued on. Charles G. Johnson, who then held the mortgage now alleged to be merged, became a party to this act and stipulated, "that so soon as the said William Balfour shall have paid unto the said Edward R. Chew the said purchase-money, (10,480 dollars,) secured by said mortgage, the said Charles G. Johnson, will exonerate and release a mortgage he has upon the said land." It is conceived unnecessary to go into any argument to show, that a promise to release a mortgage so soon as a sum of money is paid, is not a release until that money is paid. Far from the instrument proving a merger of the previous lien, it establishes the mortgagee retained it, until the second should be discharged.

The most important question in the case, is the effect of the sale by the sheriff.

The conveyance of that officer, after reciting the authority under which he acted, and describing the premises sold, states: "that having exposed the same at public sale, according to law, on a credit of twelve months, and subject to a balance of a mortgage given by Samuel Chew, in favor of Charles G. Johnson, dated the 7th November, 1818, for 6000 dollars, as appears by the certificate of the parish judge, dated the 17th May, 1824, and annexed to the order of seizure, Thomas W. Chinn became the purchaser thereof, for the price and sum of 3450 dollars, for which he gave bond and security according to law." In conformity with this deed, is the bond of the purchaser who interpleads, and it is payable to the seizing creditor.

In opposition to the apparent legal effect of these two instruments, it is contended, that notwithstanding the language used in them, the sale was for the benefit of the previous mortgage, and that the amount of the money made should be credited on it.

This conclusion is obtained from an argument which rests on the following postulates:

"That a bid at sheriff's sale is a bid for the absolute value of the property, and, when it is incumbered, is not a bid over and above incumbrances.

"That at a sale by execution, of property subject to prior incumbrances, where the bid does not amount to the debt due on the prior incumbrance, it is yet an absolute sale, and vests the title in the highest bidder."

The second of these grounds has been already examined, and considered untenable by this court, in the case of De Armas *v.* Morgan; the reasons on which we came to the conclusion there expressed:

that there was no sale unless the property brought more than the sum for which it was previously mortgaged, appears to us, on re-examination, correct; and we therefore pass to the consideration of the other and more important question. 3 *N. S.* 604.

The proposition contained in the first ground we take to be correct: we think the act of 1817, by enacting, that the purchaser shall be personally liable for the amount of the previous mortgage, evidently contemplates the whole property should be sold, and the inconveniences which would attend the other interpretation, fortifies the construction which is fairly drawn from the expressions used in the law. But although such, in our opinion, is the true meaning of the provisions on this subject, a question of infinitely more importance in the decision of this cause arises, and that is, how must this bid be made? Must it be for the entire value, with the obligation to pay the previous mortgage out of it? or will it be sufficient for the buyer to bid the value over and above the mortgage, subject to its payment? We think either mode will meet the requisition of the act. The statute provides, "that the sheriff or other public officer making the sale, shall only receive from the purchaser the surplus for which the property shall have been sold, over and above the amount of the special mortgage." On bidding the whole amount then, no money is paid but that which remains after satisfying the mortgage: in bidding the surplus over the mortgage, and with the obligation to discharge it, he only makes the deduction before the sale, which he would and must take after. Any other construction, it appears to us would be substituting words for things. There is no real difference between buying a thing for 3450 dollars, to be paid the seizing creditor, with an obligation to discharge a previous mortgage for 6000 dollars, or purchasing it for 9450 dollars, 6000 dollars of which is to be retained to discharge that mortgage, and the balance to be paid the creditor at whose instance the sale is made. The sum to be paid is the same; the time of payment is the same; the persons to whom the money is to be paid the same; and the law in pronouncing on the validity of the contract must be the same, unless it overlooked facts in pursuit of verbal distinctions.

If the facts of this case brought the interpleader within the principles just laid down, we are satisfied, after much consideration, it would be our duty to hold him to the bargain, no matter how severely it might affect him; but on examining the evidence, we find they do not. Our opinion, that a bid for the surplus above the mortgage, with an obligation to discharge the incumbrance, is the same thing as a bid for the whole amount, deducting the mortgage, is based upon the idea, that in the first mode the buyer comes under the same personal obligation to discharge the mortgage, that he would had he bought in the latter. The evidence, however, furnished by the sheriff's return, and his deed of conveyance excludes this idea. The statute says, the property shall be sold subject to the payment, by the purchaser, of the previous mortgages or pri-

vileges. The return of the officer states, the land was sold subject to the mortgage; the deed uses the same expressions; and neither makes mention that it was sold subject to the payment by the purchaser. This distinction, which at first blush appears to partake of the nature of those verbal ones we have this moment reprobated, will appear, on a close examination, to be material, and change entirely the nature of the act. If the purchaser became personally responsible for the mortgage debt, the amount of this engagement would make a part of the sum he was to pay for the land, and consequently his bid be for the absolute value. But when the land alone is made liable, there is no personal obligation on the purchaser beyond that which he promises to pay the seizing creditor; hence the bid can be viewed in no other light than one for the surplus value, and so considered, we do not think it such an one as the law sanctions or permits.

As the defendant has been deprived by the peculiar circumstances attending this case, of offering his land to satisfy the second order of seizure and sale, we think justice requires, the plaintiff should be enjoined from selling the negroes, until the defendant can exercise the right which the law confers on him, of pointing out what portion of his property he wishes to give up, to satisfy the execution.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the sale and all proceedings which were had on the first order of seizure, be set aside and declared null and void; that the bond of the purchaser T. W. Chinn, be cancelled, and all parties be restored to the situation in which they were at the time of granting the first order of seizure and sale: it is further ordered, adjudged and decreed, that the second order of seizure and sale, and all proceedings under it, be set aside, reserving to the mortgagee's creditor the right to enforce his claims according to law; that the defendant Chew, and the interpleader Chinn, pay the costs of the court of the first instance, and the appellee those of appeal.

Ripley and *Conrad*, for the plaintiff.

Woodroff, *Watts* and *Lobdell*, for the defendant.

Galloway *v.* Legan. IV, N. S. 167.

EIGHTH District.

Held, in an alternative obligation the choice is with the party promising. See *Pothier on Oblig.*, *nos.* 244, 247.

Where a borrower gave, for the use of money, the services of a slave: *Held*, that the estimate, made by the parties to the contract of mortgage, of an equality of value between the use of the money and the services of the slave does not form so exclusively a rule for the interpretation of the jury as to exclude the application of the laws. The value of the services of the slave was a fair subject for the production of testimonial proof in the court below. The witnesses which were introduced varied in their opinions, but all agreed that her services were worth much more than the highest interest tolerated by law, on the sum borrowed by the owner. The verdict of the jury was for the borrower: it is, therefore, unsupported by the evidence. This seems to have been of the class of contracts, the intention of which is to secure to lenders of money more than a legal interest, or lawful interest upon convention, and which contracts are void by our laws. In support of the correctness of the present opinion, see the case of Herman *v.* Sprigg, and the authorities therein cited, 3 *N. S.*, and also the *Nueva Recopilacion*, *B.* 8, *tit.* 6, *law* 4.

In opposition to this doctrine, assumed by the court, the counsel for the defendant contends, that the contract under which his client holds the slave in dispute, is not a mortgage or hypothecation, but a *vente à remeré*, or sale with the power of redemption. It is seen that in the investigation of the cause, we have in conformity with the expressions used in the instrument by the parties, considered it a contract of mortgage; it is perhaps not such, strictly speaking, but partakes more of that species of pledge known to our laws under the denomination of anticresis. It is not a *vente à remeré*, for no clause in the act seems to contemplate a transfer of property.

The plaintiff having demanded a jury to try the cause; and as it is a suit in which damages are claimed, this court is of opinion that the most correct judgment which can be given, under the present circumstances of the case, is to remand it for a new trial.

M'Micken *v.* Fair. IV, N. S. 172.

THIRD District.

Held, a witness, whose interest it is to defeat the claim, is a good one for the plaintiff. *Also*, a witness may be excluded as to the items of an account in which he is interested, yet he must be heard on the others. 4 Cranch, 62.

Canfield & Dixon *v.* Maher *et al.* IV, N. S. 174.

PARISH Court of New Orleans.

Insolvent's books not admissible in an action between creditors.—3 *Martin*, 707; 12 *Ibid.* 157.

Goods delivered to a creditor, when debtor is on the eve of bankruptcy, and not paid for at the time of delivery, but given in discharge of an antecedent debt, may be recovered by syndic. See Ritchie *et al. v.* Sands *et al.*, 10 *Martin*, 704. See also, 3 *Martin*, 277; 4 *Ibid.* 625.

Williams *v.* Hooper. IV, N. S. 176.

EIGHTH District.

A record is the best evidence of what was done in a cause, and it cannot be contradicted by parol.

Boyd *et al.* *v.* Howard. IV, N. S. 178.

FIRST District.

The court re-affirm the doctrine, that a vendor who alleges a sale at a specific price, may, if he has no proof of the vendee's assent to the price, show it is a proper one by evidence of its being the current price, although he has no mention in his petition of a *quantum val.*

Dupau *v.* Richardson. IV, N. S. 181.

FIRST District.

The merits of an action to which an injunction is accessory cannot be examined on a motion to dissolve the injunction, any more than a debt can be disproved on a motion to set aside an attachment.

Cucullu *v.* Manzenal *et al.* IV, N. S. 183.

Partnership property may be attached in a suit against one of the members of the firm.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit is commenced by attachment, which seems to have been

laid on property belonging jointly to the defendants and another person; in other words, on partnership property.

The court below dismissed the suit, considering that no property of the defendants had been seized under the writ, and from this order of dismissal the plaintiff appealed.

The garnishee, who was cited in the case, and answered interrogatories, states, that he had property in his possession, which he obtained by the authority, and on account, of a firm composed of Cuestra Manzenal & Toso, of the Havana, which produced net on sale, the sum of 960 dollars.

On this fact a question of law arises; whether partnership property be liable to attachment for the individual and particular debts of one or more of the partners? The remedy by attachment is out of the ordinary course of judicial proceedings, as it authorises adjudication against defendants, without personal citation on a seizure of their property; which may be considered as a means of compelling the appearance in court, of persons who cannot be reached by ordinary process. The seizure of any property, however small the amount, is sufficient to give cognisance of the cause, and authorise proceedings to final judgment. Our law extends attachments to every species of property, and all rights and credits of defendants. Each partner of a commercial firm, has a right to his portion of the partnership property according to the terms of the association; all are possessors of a common property, and every one for himself and his copartners. The right and interest which each individual of the society has to an undivided share of the partnership effects, may be seized and sold under execution, and it may also, in our opinion, be seized under our attachment law.

The situation of property belonging to a corporation established by law, differs essentially from that of a mere voluntary association of men for the purpose of carrying on the ordinary affairs of life. Their common stock is the property of each and every individual, and not distinctly that of the whole body, as in case of a corporation established by law. The case in 7 *Martin*, 31, is clearly distinguishable from the present; the former related to the rights of a body corporate; this to the property of men who hold it in common it is true, but in which each is entitled to a certain share, which gives to the individual an interest that may be separated from the mass.

We are of opinion that the seizure in the present case, is sufficient to authorise proceedings in the attachment, and, consequently, that the judge *a quo* erred in dismissing it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed, avoided and annulled, that the plaintiff's action be reinstated, and the cause sent back to the court below, to be proceeded in according to law.

Workman, for the plaintiff.

Pierce, for the defendants.

Bellievre *v.* Bird. IV, N. S. 186.

THIRD District.

Decided, where the demand of payment of a note was neither made on the maker personally, nor at the place of the maker's domicil previous to his removal, nor at his residence in the place to which he had removed, the demand was not legally made. Bailey on Bills, 58; 14 Johns. 114; 9 Wheat. 600; Chitty, (ed. 1821,) 335.

Blanchard *et al.* *v.* Ternaut. IV, N. S. 188.

FOURTH District.

A suit for land may well be brought in the parish of defendant's domicil. See 3 *N. S.* 651, 655.

Corporation *v.* Paulding. IV, N. S. 189.

FIRST District.

Decided, the Supreme Court will not grant a *mandamus* directing the district judge to set aside an order of his own, which on a challenge to the array directed the jury to be discharged, and the cause to stand continued, as manifestly no useful purpose could be attained by it.

Pigeau *et al. v.* Commeau. IV, N. S. 190.

Evidence that a curator was appointed in 1813, will be admitted under an allegation that the appointment was made in 1815.
Latent ambiguity may be explained by parol evidence.

PARISH Court of New Orleans.

MARTIN, J., delivered the opinion of the court.

The plaintiffs state that, being unable to satisfy a judgment, they have obtained against their late curator, they pray that a lot he has sold to the defendant, and on which they have a tacit mortgage, may be sold to satisfy them; they had judgment accordingly, and the defendant appealed.

The counsel urges, the judge *a quo* erred in admitting a record and a witness, to which and to whom he excepted; and in giving judgment that the defendant shall be entitled to his recourse against her vendor cited in warranty, by virtue of the judgment, instead of giving judgment against the latter for a specific sum. Pilie *v.* Mollere, 2 *N. S.* 472.

We are of opinion the record was properly admitted; it is that of the curator's appointment in 1815, and the objection was, that the plaintiffs had stated in their petition that he was appointed in 1813. Even in case of murder, evidence of its commission on a day different from that laid in the indictment, is received to support the charge.

The witness objected to, was offered to explain a latent ambiguity, whether a certain lot on a certain street, was the one which had been sold.

The judgment is clearly erroneous in not according judgment for a specific sum, against the warrantor, and in saving only the remedy against him.

It is, therefore, ordered, that the judgment, as far as it regards the warrantor, Garcia, be annulled, avoided and reversed, and that the original defendant Commeau, have judgment against him for six hundred dollars, with costs in both courts, and that the judgment against the original defendant be affirmed, with costs.

Morel, for the plaintiffs.

Hoffman, for the defendant.

Baldwin *v.* Gray. IV, N. S. 192.

The liability of partners on a contract made in this state, is governed by our laws, not of that, where the partnership was entered into.

A receipt to a debtor *for his part*, extinguishes the obligation *in solido*.

FIRST District.

PORTER, J., delivered the opinion of the court.

The facts in this case do not appear to be controverted; the only matter disputed is the legal obligations which arise on them.

The plaintiff was agent for the steamboat Fayette, of which the defendant was part owner. This action is instituted to recover the amount of an appeal bond, given in an action, wherein the owners of this boat were defendants, and also for moneys paid for the expenses of the boat while in this port.

It is insisted the defendant is liable *in solido*, because the contract by which he became interested in this vessel, was entered into at Pittsburg, in the state of Pennsylvania, where the common law prevails.

This law governs the obligation of the partners with each other, but not with third persons. It can no more affect the rights of those who contract with them in a different country, than particular stipulations between the partners could. The contract entered into in the case before us, was made in this state, and must be regulated by the *lex loci contractûs*. This is the general rule, and we know of no exception to it, unless the agreement is in respect to land in another country, or the performance is to be in another state. A foreigner coming into Louisiana, who was twenty-three years old, could not escape from a contract with one of our citizens, by averring that according to the laws of the country he left, he was not a major until he reached the age of twenty-five.

We think, therefore, that the defendant is only liable for his *virile* portion of the moneys laid out and expended on the steamboat Fayette. Caroll *v.* Waters, 9 *Martin*, 500.

In relation to the appeal bond, it seems to be conceded the defendant is liable *in solido*, unless there has been a severance of the judgment.

The evidence of this, it is contended, is presented by a letter of the plaintiff to the defendant, in the following words:—

New Orleans, August 8, 1823.

Mr. J. F. GRAY:

Dear Sir—In consequence of the late judgment here against the

Fayette, of which I informed you under date of the 27th ultimo, I have to request you to pay over to Wilkins M'Ilvaine & Co. immediately, 700 dollars, being your proportion of the whole amount of debt.

Your early attention to this is respectfully solicited, because of my having drawn on them for the gross amount.

(Signed,) J. BALDWIN.

Payment of this sum was made as requested, and M'Ilvaine & Co. gave a receipt in full of "Mr. Gray's separate account with Joshua Baldwin, as furnished us as one of the owners of the steamboat Fayette."

There can be no doubt, that the expressions used in this letter, and the receipt extinguish the obligation which the defendant owed *in solido*. When a receipt is given a co-debtor *for his part*, it is an acknowledgment that he is not bound jointly and severally, it being inconsistent that a person should be debtor for a part, and debtor for the whole. *Pothier des Obligations, no.* 277; *Toullier, Droit Civil Français*, vol. 6, *liv.* 3, *tit.* 3, *cap.* 4, *no.* 741; Civil Code, 290, art. 111.

The language used in a subsequent letter of the defendant, by which he states, that "Mr. Anderson will pay the balance of the account, and if not, they must," has been relied on as restoring the obligation *in solido*. We think the expression can only be considered as a recognition of the previous obligation by which each was only responsible for a part, and that the parties did not contemplate a new obligation.

There is no foundation for commissions charged on money paid on the appeal bond, and for costs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant, the sum of one hundred and eighty dollars, sixty-nine cents, with interest from judicial demand, the costs in the court below, and that the appellant pay the costs of the appeal.

M'Caleb, for the plaintiff.

Whittelsey, for the defendant.

Gray *v.* Baldwin. IV, N. S. 196.

FIRST District.

An assignment *sous seing privé* does not authorise the assignee to take out an order of seizure and sale.

The surety who pays for the principal, is not entitled to take out execution in the name of the creditor. See 1 *N. S.* 237.

Meriam *et al. v.* Worsham *et al.* IV, N. S. 198.

FOURTH District.

A partner who has sold out to his copartners any debts that *may* be due to the firm, and who on the trial receives a release from the partnership, is a competent witness to prove a debt due to it.

The COURT say:—We do not see what possible interest the witness had in the event of the cause. He did not become by his act, warrantor of even the existence of the claim in question, for his transfer does not set out any debt as positively existing, it conveys only such debts *as may be* belonging to the firm.

Simmins f. m. c. *v.* Parker. II, N. S. 200.

FIRST District.

Held, that an act of emancipation passed by a person, who at the time held and possessed the negro as a slave, is *prima facie* evidence that it was done by the owner.

Quære, whether an act of sale which acknowledges payment of the purchase-money be synallagmatic, that is, one containing reciprocal obligations, or promises to do? But if it be, and if it ought in obedience to law to be double, the defect of this does not make it null. It is good as a commencement of proof in writing, though made single. Besides, the other evidence in this case shows that the contract of sale was executed, by the delivery of the object sold. *Toullier, Droit c. f.* 8, *c.* 6, *sect.* 1, *no.* 221.

A partner cannot alienate real estate belonging to the firm, though it would be perhaps correct to say, that he may legally sell the right of warranty against the vendor from whom the firm purchased, *in case the partnership* was in existence at the time of the sale. *Aliter*, if the firm was dissolved at the time of the conveyance made from the surviving partner to the defendant.

The sale of a citizen's right, though in the Spanish law, null, and of no effect, *has effect* of a certain sort by the Civil Code. See *Partida* 3, *tit.* 7, *l.* 13; Civil Code, 368, 131.

An intermediate vendee can sue his vendors before the person to whom he, the vendee, sold, has brought an action and recovered.—This subject received a particular attention in the case of Goodwin's Heirs *v.* Chesneau, 3 *N. S.* 422. This court there *held*, that the vendee's right to sue on his warranty was complete the moment the person to whom he sold was evicted.

EASTERN DISTRICT, FEBRUARY TERM, 1826.

L. & F. Frique *v.* Hopkins *et al.* IV, N. S. 212.

Lands granted by the king of Spain to the husband alone, did not make a part of the community of acquests and gains.

But the improvements made on them do.

Payment of the price of real estate may be proved by parol, but such proof of that fact will not establish there was a sale.

Ten years is the period of prescription, where the possessor claims by a title adverse to the petitioners.

It is sufficient for the prescription *longi temporis*, that the buyer be in good faith.

If the title be null in itself, or discloses facts, which show the vendor has no title, the buyer cannot plead this prescription.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The petitioners in this case are Laurent Frique, and Felonice Frique, the former of full age, the latter a minor above the age of puberty. They state that they are the heirs and representatives of the late Henry Frique deceased, and that as such they have a right to recover of the defendant two-thirds of a lot, with the buildings thereon, situated in the parish and city of New Orleans, illegally alienated by their mother.

From further statements in the petition, it appears, that at the death of the father he left three children; that one of them died without descendants; and that the mother became his heir. That Laurent Frique

is the son of Henry Frique, and Felonice Frique, the other plaintiff his granddaughter, is the child of Celestine Frique, deceased.

In addition to the prayer, that the lot may be sold, and a partition made of the proceeds; the plaintiffs demand the two-thirds of the rents and profits from the decease of their mother, up to the time of rendering final judgment.

The defendant pleaded the general issue; prescription; the receipt by the heirs of the portion which belonged to them of their father's estate; and he cited in warranty his vendor, Poincy.

Poincy appeared, and vouched John F. Miller, who filed an answer, which did not change the issues already formed by the pleadings; except in claiming to be paid for the buildings and improvements in case the plaintiffs succeeded.

The court below gave judgment for the petitioners, and the defendant appealed.

The case presents three questions of law, the facts do not appear to be disputed.

The first is, whether the property alienated by the mother, made a part of the community of acquests and gains?

The second, whether there is legal evidence of the plaintiff's having approved of the sale?

And the third, whether they are now barred by prescription?

I. The property claimed in the petition, as belonging to the ancestor of the plaintiffs, was granted to him by the king of Spain. A copy of the grant comes up with the other evidence. It does not appear to contain any thing that would authorise the court to take it out of the general rule, which governs cases of this kind. The consideration or moving cause of the gift is stated, to be the public good, and in order to increase the population of the city.

In the case of Gayoso *v.* Garcia, reported in the first volume of the New Series, we declared it the opinion of the court, that lands granted by the king of Spain, to either husband, or wife, during coverture, did not enter into the community, but belonged exclusively to the individual to whom it was granted.

The same question is presented in this cause, and we have again examined it, with the attention, that is due to the importance of the subject, and to the argument at the bar.

The law on which the former decision of the court was principally based, is the following words:—*Toda cosa que el marido y muger ganaren ó compraren estando de consuno hayanlo ambos por medio: y si fuere donadio de rey ó de otri y lo diese á ambos hayanlo marido y muger: y si lo diere al uno hayalo lo solo aquel á quien lo diere. Novísima Recop. lib.* 10, *tit.* 4, *ley* 1; which is *ley* 2, *tit.* 9, *lib.* 5, of the *Nova Recopilacion.*

By this statute, it is expressly declared, that whatever may be given by the king, or another, to both husband and wife, shall belong to them jointly; but that if given to any one of them, it shall be considered as belonging to the individual to whom it is given.

The commentators seem to understand this law to apply to all cases coming within its letter, except those where the king gives in remuneration of services rendered him, and even this exception is made, with the limitation that the husband serves without pay, and is supported at the expense of the community. This opinion is supported by a law of the *Fuero Real* which declares, "*y si fuere en hueste sin soldado á costa de si, é de su muger, quanto ganare de esta guisa, todo sea del marido, é de la muger: ca asi como la costa es communal de ambos, lo que así ganaren sea communal de ambos.*" *Fuero Real, lib.* 3, *tit.* 3, *ley* 3, which is *lib.* 10, *tit.* 2, *ley* 4, *Novísima Recop. Febrero, p.* 1, *chap.* 1, *sect.* 22, *no.* 239; *Ibid. p.* 2, *lib.* 1, *chap.* 4, *sect.* 1, *no.* 21; *Gomez en ley* 50 *de Toro.*

The correctness of the application of these laws, to a grant of lands by the former sovereign of Louisiana, has been contested on two grounds.

1. That there is a material difference, between a donation, and concession.

2. That as it appears, by all the regulations made here by the Spanish government, in relation to concessions for lands, that the quantity conceded, was greater or less according to the circumstance, of the grantee being married and having children, or being single; grants made to a man who was married, must be the common property of both husband and wife.

As to the first of these grounds, we apprehend there is nothing in it which requires our particular consideration. We are unable to perceive any material difference between a donation, and a concession of lands such as the former government of Louisiana was in the habit of granting. It is true concessions may be made, on consideration moving from the donee, which would take from them the character of a donation. But lands given by the king, without price paid for them, and not in remuneration of any services rendered, certainly are donations; if they be not, we are ignorant under what denomination they should be classed.

The second ground was most relied on in argument. It did not escape our attention in the case already alluded to, though no notice is taken of it in the opinion delivered. But we were unable then, as we are now, to discover in it a sufficient reason for taking the case out of the plain and positive provisions of the statute. The consideration which induced the grant or donation cannot change its character, unless there is a positive provision of law which makes the exception: as in that given from the *fuero real*, where the thing granted is in remuneration of services rendered, at the expense of the community. Were we to take this as valid ground for evading the positive enactment of the legislature, it would lead us, we apprehend, much further than is contemplated by those who press it on our adoption. By the regulations of the Spanish government, if the individual who applied for land was unmarried a certain quantity of land was given to him; if he had a wife this quantity was increased; and if he had children

an additional number of acres were conceded. Now if the circumstance of his being married made the thing given become the property of both husband and wife, we must, on the same principle, hold, that where children were the moving cause, they too should be considered as owners in common of the land conceded. But that such was the effect of the donee having a family, we believe was never even suspected; it certainly is unsupported by law. Many donations are made, in which the donee's having a wife, and being burthened with a large family, is a great consideration for the beneficence of the donor; but this motive in him, does not prevent the person to whom the gift is made, from being considered its owner, nor prevent the thing given from descending to his heirs.

It was, however, said that the object in making these grants was to encourage the settlement of the country; and that to carry that object into effect, it was necessary the lands should be considered as given to both husband and wife. To this it might be answered, and with great force, that if the government were of that opinion, it is strange they did not at once say so, and by making the concession in the name of both, place the matter beyond doubt; and not, by granting it to one of the spouses, leave it to the operation of a positive law which repelled the idea. But if we could enter into political considerations, in order to ascertain whether they could repeal statutes, we would, in this case, be led to the examination of a nice and refined question of policy, in relation to the effect on national prosperity, of giving to the wife a distinct interest in the property acquired during marriage; one on which men would be found to differ, according to their education and particular modes of thinking. Some nations, whose fate has been as prosperous as those of any community, with whose history we are acquainted, proceed on an entirely opposite principle, and act on the idea, that domestic felicity, and consequently public happiness, are best promoted by considering the acquisitions made during coverture, as belonging to the husband alone.

It is true the Spanish law viewed this matter in a very different light, but the same law makes a positive exception, in respect to donations, and the political consideration is surely not so clear as to authorise us to make a distinction where the legislator has made none. On the contrary, it may be as readily conceived that those to whose care the colonisation of this country was entrusted, thought strangers might be invited into it, and settlements formed with as much facility by giving all the land to the husband, as by giving it to the husband, wife, and children. The father, as head of the family, had a right to select his place of residence; the wife was bound to follow him. It was natural he should go to that place where the most advantages were conferred on him; where he knew, in the event of losing his life, from the perils and sufferings of a first settlement, that the objects which induced him to come there would go to his children; and not be divided with those of another bed, in case his wife survived him and married a second time.

But whether these views be correct or not, we feel satisfied that the reasoning which might be opposed to them, is not of sufficient weight to allow us to decide contrary to the express and positive provisions of the law.

Nor do we think that the circumstance of these lands being in general waste and uncultivated makes any difference in the right of property. The augmentation of value given by the common labor makes a part of the acquests and gains, and the wife has a right to the one half the value of the improvements, as she would if they had been made on any other property belonging to the husband, but her right in the ameliorations made *on this property* is quite distinct from a right *to the property*. *Febrero, p.* 2, *lib.* 1, *cap.* 4, *sec.* 4, *nos.* 74 and 75; Civil Code, 338, art. 70.

Considering, therefore, that the lot conceded to the husband, belonged to him and descended to his heirs, we proceed to examine whether they have been divested of the title.

II. It is urged they have, because they received the price for which their mother sold the lot. The evidence offered in support of this part of the defence is entirely verbal, and its introduction was excepted to in the court below. Now, though it is clear that payment of the price of an immovable may be established by parol testimony, yet this species of proof is not sufficient to show both the sale and the receipt of the purchase-money. To permit such evidence to have that effect would be virtually repealing all the provisions of our law in regard to the mode of proving the alienation of real estate. Nor is the case made better by viewing it as a ratification of the sale by the mother; for she did not sell it as making a part of the succession, but in her own right. Nor does it change our view of it, to consider the receipt of the money as operating a partition; for partition includes alienation and sale, and consequently requires as high evidence as any other alienation of immovable property would.

III. The remaining questions relate to the plea of prescription. The first inquiry is, by what prescription should the case be governed? The plaintiff contends that of thirty years, because it requires that space of time to bar a suit for partition; and if this should not be considered an action of that kind, he still urges that the same period must govern, because the title under which the defendant acquired, is not such a one as enables the possessor to acquire a right in ten years.

This, in our opinion, is not an action of partition. The defendant claims by a title directly adverse to that of the plaintiffs; and so the plaintiffs understood his claim, for they aver that he is wrongfully and unlawfully in possession of that part of the property which belongs to them.

The other point is of more difficulty. Before we go into the question, whether the titles under which the defendant claims, are sufficient to enable him to plead the prescription of ten years, it is proper to notice an authority read by the counsel for the plaintiffs, from the

Partidas, that it is necessary, for the support of this plea, that the seller as well as the buyer should be in good faith. This is directly opposed to the generally received opinions on this matter; and after an attentive examination of the law relied on, and others contained in the same work, we are of opinion, it is sufficient for this prescription if the buyer receives a title capable of transferring the property, and possesses in good faith. Even taking the provision in the *Partidas* in the sense contended for by the plaintiffs, and without reference to the other enactments on the same subject, the plaintiff who is of full age would be barred. A law, contained in the same work, which was not cited in argument, makes it the duty of the owner, if he is aware of the alienation, to sue in ten years, where the vendor knowingly sells without a title. In the present instance this knowledge is fully brought home to the plaintiffs, by the parol evidence, by the deed being an authentic one, and by the possession which the purchaser took of the premises. *Part.* 3, *lit.* 29, *laws* 18 and 19; *Ibid.* 6, *lit.* 7, *law* 14; Dufour *v.* Camfranc,1 1 *Martin*, 716.

There is a good deal of confusion, and some apparent contradiction, in the books which treat of the title necessary to form the basis of the prescription *longi temporis*. The correct doctrine, we think, is this: that if the title, under which the acquisition is made, be null in itself, from defect of form, or discloses facts which show the person from whom it is acquired has no title, it cannot form the basis of this prescription; because the party acquiring must be presumed to know the law, and consequently wants the *animo domini*, which is indispensable in cases of this kind. But where the title is free from these defects, and the property is not transferred, by want of title in the party making the transfer, then it forms a good ground for the prescription; or in other words, the inquiry is, whether the error be one of fact, or of law. *Pothier, Traité de Prescription, no.* 57.

In the present case some doubts might exist which of these the present defendant was subject to, if the case were examined in relation to the title from the mother to Phillibert, though we are inclined to think it was more properly one of fact, than of law. But whatever might be the doubts in relation to his title, there can be none, we think, respecting that of Boirin, who purchased from the first vendee. The sale to him is perfect, in point of form, and discloses no fact which shows the title to be defective. It is not sufficient to deprive the possessor of the right of pleading prescription, that he might, by inquiry and careful examination, discover his vendor had no title. If it were, then the law would have no effect, which says the want of title in him who transfers, shall not prevent the party to whom the transfer is made from pleading prescription.

This opinion we entertain with regard to the title, settles the question respecting the rents and profits.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the minor plaintiff, whose claim

has not been barred by prescription, do recover of the defendant the one-third of the premises claimed in the petition; that the defendant pay the costs of the court below, and the plaintiffs those of appeal.

Morel, for the plaintiffs.

Carleton and *Locket*, for the defendants.

State Bank *v.* Hennen. IV, N. S. 226.

FIRST District.

If a note be made payable at the house of maker, a demand at his dwelling, or his office, (place of business,) is good. The fact of the defendant's temporary absence from the city, does not vary this case from that of Miller *v.* Hennen, 3 *N. S.* 587.

It is enough that the person to whom the holder means to resort for payment, has legal notice. Holders are not bound to give this notice to all the parties on a bill or note. Chitty on Bills, (1821,) 295, 6.

Henderson *v.* Beale's Curator. IV, N. S. 228.

COURT of Probates of New Orleans.

The opinion of the judge *a quo* on questions of fact will be sustained, if not manifestly erroneous.

Treme *v.* Lanaux's Syndics. IV, N. S. 230.

The wife may renounce her mortgage on her husband's estate.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The question presented in this case is whether the renunciation made by the wife of the insolvent, of the mortgage which she had on her husband's estate for the restitution of her dotal and paraphernal effects is binding on her.

This renunciation was made by public act, in a contract where the husband gave a mortgage to secure a person, who is now one of the creditors, against the responsibility he incurred by endorsing notes for the insolvent. The property on which the mortgage was renounced formed a part of the acquests during marriage.

The act of mortgage after stating that the wife of the mortgagor appeared and had become a party to the act, she being duly authorised to that effect, by her husband, proceeds thus: "And the said Mrs. Lanaux, after having read and understood what is already written, said and declared, that being well informed of the rights which the law granted her on the property mortgaged by her husband in the present act, she consents to said mortgage, she renounces all rights of mortgage which she has on the same, and particularly the hypothecation resulting from their contract of marriage. Upon which the notary aforesaid declared to the said Mrs. Lanaux that before receiving her consent and renunciation, it was his duty to inform her that by the laws of this state, she had a tacit mortgage on the property of her husband, and also upon those of the community which existed between her and him, in case she renounced said community. First, for the restitution of her dowry, and for the replacing of her dotal effects brought into marriage. Secondly, for replacing the dotal property which she might have acquired during marriage, by succession, donation, or otherwise. Thirdly, to indemnify her for the debts which he had contracted, or might contract with her husband, as well as for replacing her proper goods alienated. Fourthly, for her paraphernal property, of which the husband might have the administration, and the use. And Fifthly and lastly, for the donations made by her husband by cause of marriage. That by giving her consent to the said mortgage of her husband, she deprived herself irrevocably, and for ever, of her recourse on the property therein mentioned, whether by reason of mortgage, privilege, or otherwise, unless the said notes

should be punctually paid by her husband. Upon which, the said Mrs. Lanaux declared that she persisted in the same will she had already manifested, and to this effect she declared that she consented, and by these presents did expressly consent to the said mortgage, as being agreeable to her: abandoning all rights of mortgage or others, which she had, or might have upon the property which form the object thereof, whether by title of dowry, donation or otherwise, and renouncing formally, now and forever, her said right in favor of the said Claude René. And she promises and binds herself, as well in her name as in that of her heirs and assigns, that she will always hold and consider valid the said mortgage, as well as the renunciation she now makes, to the right which she had, or may have, on the property on which the said mortgage has been given: that she or no other person in her name, shall ever contest it, and she renounces all rights, privileges, laws, and customs, existing in her favor, or which she might invoke against the said Claude René. By reason of which, &c. &c."

As there seems to exist yet a considerable doubt, as to the extent to which married women may bind themselves with their husbands, and to the form as well as the effect of the renunciation made by her; the present seems a convenient and proper occasion for bringing together, and passing in review, the decisions already made in our courts on this subject.

The first case was that of Beauregard's Executor *v.* Peirnas' wife. That was an action to recover out of the property of the wife, (the husband having become insolvent) the price of a slave sold by the testator to the husband by a notarial act of sale, to which the wife became a party, *as surety*, and as such in conjunction with her husband, hypothecated her property present and to come.

It was decided in favor of the defendant, on the ground that the renunciation was general, instead of being, as the law required, special; that the notary had failed to mention that the 61st law of *Toro* was renounced, but had stated generally, that she renounced all the laws of *Toro*. 1 *Martin*, 281.

The second was that of Brognier *v.* Forstall. In that case the wife bound herself jointly with her husband, to the payment of a debt, to secure which, they mortgaged to the creditors certain slaves. She afterwards contested the validity of the contract, on the ground that the obligation had not been made in such a manner as to bind her; and that it had not destroyed the tacit mortgage which she had on her husband's property, for the restitution of her dowry. The court gave judgment against her. On the first ground because the renunciation was formal; on the second, that the effect of this renunciation was to destroy the tacit mortgage she had for the restitution of her dowry, as well as to render her liable according to the obligation she had entered into.

In pronouncing judgment, the court also decided, that when the renunciation was made in due form, it was unnecessary to prove the

contract had turned out to be beneficial to the wife; and also that the case was not such a one as required a special renunciation, that being only requisite when the husband contracted singly, as in cases where he alone had a right to act. 3 *Martin*, 577.

The third case was that of Bourcier *v.* Lamusse, where the wife joined in the sale of property belonging to the community. The court there took the distinction between those contracts in which the wife was a party principal, and those where she made her appearance in the character of a third party. But decided that the instrument produced was not binding on her, because she had renounced a law not made for the contract she had entered into; but for her protection in case she bound herself *in solido* with her husband. 3 *Martin*, 581.

The next time the question came before the court, was in the case of Chapillon and Wife *v.* St. Maxent's Heirs. In the contract which gave rise to it, the wife had bound herself jointly with her husband, and mortgaged her property for a debt due by him. The renunciation was in due form, and the court, adhering to its decision in the case of Brognier *v.* Forstall, declared, that it was not necessary, to prove the debt was created for her advantage. 5 *Martin*, 167.

The same subject was again presented in the case of Durnford *v.* Gros and his Wife, where the latter had entered into an obligation jointly with her husband. There was no renunciation in the act, and the court decided that the plaintiff must prove the debt had turned to her benefit; and such proof not being given, judgment was for the defendants.

In that case, the court also held that the Civil Code had not changed the ancient laws in this matter, and they further declared it their opinion, that in no case could the wife bind herself as surety for the husband. 7 *Martin*, 484.

The point last mentioned came directly before the court in the late case of Banks *v.* Trudeau, and the opinion there expressed, in relation to the power of the wife to become security for the husband, was in conformity with that already intimated in the case of Durnford *v.* Gros. The court also held, that this prohibition could not be avoided by giving to the agreement the form of an obligation *in solido*. 2 *N. S.* 39.

From this review of these cases, it will appear that, that now before us, is different from them all. Here the wife neither bound herself jointly, nor as surety for her husband; she merely consented, that the property of the community on which she had a mortgage, should be hypothecated in favor of a third person. But even this question has been before the court, and decided, in a case which was not cited in argument. We allude to that of La Farge *v.* Morgan *et al.*, 11 *Martin*, 529.

The renunciation there made, was on a contract similar to this, and the manner in which the renunciation was made the same. That now before us pursues almost literally, the 58th law of the 18th title

of the 3d *Partidas*, which prescribes the manner the act should be drawn up, where the wife consents to an alienation made by the husband. We therefore think the renunciation binding on her. This opinion accords with an intimation made by the court in the case of Bourcier *v.* Lannusse, though the point was not necessary to a decision of that cause.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Morel, for the plaintiff.

Morphy and *Trabuc*, for the defendants.

Leglise *v.* His Creditors. IV, N. S. 238.

Admission of service of citation of appeal by the attorney of plaintiffs, cannot have a greater effect than service would.

PARISH Court of New Orleans.

MARTIN, J., delivered the opinion of the court.

A motion is made that the appeal may be dismissed, on the ground that, although the appellee be a resident of the state, the citation was not personally served on him or left at his domicil, but was served on his attorney.

We find not any citation returned, but observe on the back of the record, "Service accepted of this appeal, Ripley and Conrad," the attorneys at law of the appellee.

The right of appellees residing in the state, to receive legal notice of appeal themselves, is secured to them by law. 1 *Martin*, 440.

The admission of the service by the attorney, cannot have a greater effect than the actual service on him. No court ought to pass on the rights of a party, who does not appear by the return of the sheriff, or any act of his, to have been cited. The citation or the service of it may indeed be waived, but we think the waiver cannot be made by any one but the party without a special power. A service on the

* See Gasquet *et al. v.* Dimitry, 9 *Lou. Rep.* 585, 592, denying the right of renunciation under the Louisiana Code; and see the act of Assembly of March 27th, 1835, (which grew out of that decision,) giving wives above the age of 21 years, in future, under certain formalities, "the right to renounce, in favor of third persons, their matrimonial, dotal, paraphernal and other rights."

attorney, does not authorise us to proceed, unless the absence of the client is legally proved.

It is, therefore ordered, adjudged and decreed, that the appeal be dismissed, with costs.

Ripley and *Conrad*, for the plaintiff.

Seghers, for the defendants.

Dupuy *v.* Barlow. IV, N. S. 239.

In an action against a sheriff for not returning process, if a writ of sequestration issued, the presumption is that citation did also.

The measure of damages is, the amount claimed in the previous suit.

FOURTH District.

MATHEWS, J., delivered the opinion of the court.

This is a case in which damages are claimed from a sheriff for negligence and improper conduct in executing process in a suit commenced by the plaintiff against a person whom he alleged to be his debtor. Judgment being rendered in his favor in the present suit, the defendant appealed.

The evidence of the case, as it appears on the record shows, that Barlow, the present plaintiff, instituted a suit against J. T. Pemberton, to recover the amount of a due bill, given by the latter on a final settlement of accounts between these parties, which purported to be given for a balance due to the former on account of services rendered by him as manager or overseer of Pemberton's plantation. In the suit thus instituted the petition contained the usual prayer for a citation, and also one for a writ of sequestration, requiring the sheriff to seize the crop of cotton then on the plantation, in the management of which the services of the plaintiff had been given. This writ was put into the hands of a deputy of the present defendant, but no return of service of it or of citation was ever made to the court from whence these writs issued. There is no evidence of a citation having actually issued: the testimonial proof shows, that the deputy sheriff was in possession of six bales of cotton seized on the plantation where the plaintiff has acted as overseer, subsequently to the writ of sequestration having been placed in his hands. The amount owing by Pemberton to the plaintiff, is ascertained by the production of the due

bill; but subsequent to its date, it appears that Barlow had obtained a horse from his debtor, which he sold to one of the witnesses in this case for 100 dollars. On these facts appearing, the district court gave judgment in favor of the plaintiff for the full amount due by the defendant in the former suit.

There was a motion made in the court below for a new trial, based on two principal grounds: want of sufficient allegations in the petition, and the inadequacy of the evidence to support the plaintiff's claim either in whole or in part. The objections to the judgment of the inferior court, now made on the appeal, have taken for their basis grounds very similar to those relied on in the motion for a new trial.

In relation to the first of these objections, it suffices to observe, that the evidence of the cause was admitted without exceptions to its pertinency to the allegations of the petition; consequently, if it be sufficient to authorise a recovery against the defendant, judgment must be accordingly rendered, in pursuance of the law of the *Recopilacion*, so well adapted to cure all errors and defects of pleading, and which has already been applied to many cases by this court. The sole question which requires investigation, arises out of the evidence in the cause: does it show such negligence on the part of the sheriff as to make him responsible to the plaintiff in damages, and is the amount of injury ascertained by it?

The only evidence on record relative to the citation in the suit commenced against Pemberton, is the prayer of the petition that such proof might issue. It was asserted in the course of the trial of this cause, and not denied, that the clerks of the different courts of the state make no record of citations until returns on them by the officers whose duty it is by law to serve them; consequently a record in which no return of a citation is made never exhibits that process. As it was prayed for in the petition, it became the duty of the clerk to issue this process, and he must as a public officer be presumed to have done his duty, until the contrary be made to appear. It is then a legal presumption, that the sheriff had this writ as well as that of sequestration in his hands, and that he might have served them both; most clearly the latter, as it is shown that he had six bales of Pemberton's cotton in his possession after he had received it from the clerk. The attempt to show that this cotton was seized, and held by him as security for the payment of taxes due by Pemberton, has not, in our opinion, been successful; for, there is no evidence which shows that any were due, on the amount of them. By the negligence of the sheriff, in not properly serving and returning process, the plaintiff has been prevented from recovering in the suit by him commenced against Pemberton, the amount of his claim; for, it is shown, that the cotton which his deputy ought to have holden by virtue of the sequestration, was equal in value to the amount of said claim. The injury done to him by the negligence and misconduct of the officer, is equivalent to the debt, which he thereby failed to recover; and the

measure of remuneration ought to conform exactly thereto. But he has since received from Pemberton property to the value of 100 dollars, as appears by the testimony of one of the witnesses. This testimony is not impeached or positively contradicted by any facts apparent on the record; it must therefore be received as true, and the amount thus proved to have been received by the plaintiff may fairly be viewed as a payment *pro tanto* of the claim or debt which was the foundation of his former suit. The amount which he might have recovered in that suit, being the measure of damages for which the present defendant ought to answer, must be reduced by partial payments of the original debt.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellee do recover from the defendant and appellant, two hundred and nineteen dollars, with legal interest from the judicial demand in the suit against Pemberton, and that the appellee pay the cost of this appeal.

Porter, for the plaintiff.

Hiriart, for the defendant.

Richardson *et al.* v. Weston. IV, N. S. 244.

FIRST District.

A factor who extends the time of credit, though he did it not in bad faith, makes himself personally liable for the debt.

Parkinson *et al.* *v.* M'Donough *et al.* IV, N. S. 246.

Accretion takes place among legatees in case of the legacy being made to several conjointly, though the testator should by a subsequent member of the sentence in which this bequest is made, assign a part to each legatee.

COURT of Probates of New Orleans.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiffs claim, by accretion or right of survivorship, a certain portion of the estate of Shepherd Brown, deceased, held and administered by the defendants, as testamentary executors.

The question submitted for the decision of the court, depends on a just and legal interpretation of a clause in the will of the testator Brown, by which he bequeathed to four of the orphan children of Godfrey Duher, then under his charge and protection, one share or one-eighth part of his property: and this question is limited to a decision on the respective rights of these co-legatees, as based on the doctrine of accretion or survivorship, and the legal heirs of one of them, who died before partition or having obtained possession of his share of the legacy, and before the period at which, according to the terms of the will, the executors were bound to deliver it to him.

The judgment in the court of probates being against the right of accretion, under the clause of the testament above alluded to, the plaintiffs appealed.

In cases of doubtful or equivocal expressions in testaments, when disputes arise on matters to which they relate, it is a primary duty of courts of justice to ascertain with all possible precision the intention of the testator, and if it be consistent with law, to give it effect. The clause of the will now under consideration, and on which the present contest arises, is expressed in the following terms. "I will, and bequeath to the orphan children of my old friend Godfrey Duher, and which are now under my charge, and are named Mary, Nancy, James, and Eliza, one share, or one-eighth part of all my property, to be equally divided among them; the same to remain in the hands of John Hiram Brown and my friend John M'Donough, and by them employed in the education and support of them, and the balance remaining after this, if any, to be paid to them as they arrive at age or marry, recommending particularly to my friend and nephew the guardianship and protection of these my adopted little ones." We find here expressed a fatherly affection towards these orphans on the part of the testator. This affection probably grew in part out of the friendship which seems to have subsisted between him and their

deceased father; but was no doubt perfected, and received its greatest strength from the circumstance of their having been thrown, helpless, under his charge and protection. By performing the offices of a father towards them, they became unto him as children: he calls them his adopted, and as such, no doubt, intended to provide for them by this clause of his will, and that they alone should take the property bequeathed by it, in exclusion of all others, for their mutual benefit, or in legal terms conjointly. Believing this to have been the intention of the testator, it remains to inquire whether it be expressed in such a manner as to authorise the court, in pursuance of law, to give it effect. The cause has been argued somewhat elaborately by the counsel for the appellants, and in the argument, the court has been referred to decisions of the court of chancery of England, on the construction or interpretation of testaments, in relation to the vesting of legacies, &c.; to treatises on the civil law; and to *Toullier on the Code Napoleon;* also to the Civil Code lately in force. On this last authority the counsel for the appellees relies, and did not argue the case, as its decision in any way will not affect their interest. We have examined attentively the texts and commentaries found in the last two authorities, as containing doctrine most applicable to the point in dispute. We have already quoted the clause in the will, which gives rise to the contest; and as it regards the facts of the case, it is only necessary to state that James, one of the co-legatees, died before marriage, or arriving at the age of majority.

The rules laid down on the subject of accretion, in relation to testamentary dispositions, are contained in arts. 195, 196, and 197, at page 250 of the former Code. Art. 195, on the interpretation of which the present question depends, is expressed in the following words: "Accretion shall take place for the benefit of the legatees, in case of the legacy being made to several *conjointly*. The legacy shall be reputed to be made conjointly, when it is made by one and the same disposition, without the testator having assigned the part of each co-legatee in the thing bequeathed."

This article of our Code is *verbatim* similar to the 1044 of the Code Napoleon.

The testator, in the present case, bequeaths to four persons one-eighth part of his estate, to be divided equally among them. Is this a legacy made without assigning to each co-legatee his part in the thing bequeathed? The thing bequeathed is one-eighth part of the testator's succession, which he gives to be equally divided between four persons, to whom the bequest is made conjointly, according to the first member of the sentence; but according to the second, they are to partake of it in equal portions. Considering both as constituting one and the same disposition, it would seem that the part of each co-legatee was assigned in the thing, and that one-fourth of the one-eighth of the testator's estate was vested in each of these legatees separately, consequently they cannot acquire from each other by accretion or survivorship. This would perhaps be a construction

most readily given to the clause of the will now under discussion. But it is contended, for the appellants, that the terms in which this bequest is made, must be so construed as to give the full force of a complete testamentary disposition to the first member of the sentence, which is in itself perfect, in point of sense, meaning, and intention: the second only relating to the manner of execution or carrying into effect the disposition thus made.

Notwithstanding the apparent simplicity of the principles to which the Code seems to have reduced the doctrine of accretion, (which was held to be the most subtle of the civil law,) still the application of those principles to cases arising under it, is not entirely free from difficulty.

If the interpretation contended for by the appellants be tolerated by law, it will afford the means of giving effect to the intention of the testator in the present case.

In order that accretion may take place among co-legatees, it is necessary, according to the Code, that they should be *conjuncti re et verbis;* except in cases where things bequeathed to several persons separately, are not susceptible of division without deterioration; a circumstance which authorises accretion, *inter conjunctos re tantum.*

The distinction between a bequest of a thing to many in equal portions, and one wherein a testator gives a legacy to two or more individuals, to be divided in equal portions, appears at first view extremely subtle and refined. The difference of phraseology in those two modes of bequeathing is so slight as not readily to convey to the mind any difference in ideas, and can only produce this effect by separating the members of the sentence in the latter phrase; in truth to create two distinct sentences, each complete in itself with regard to sense and meaning; the one relating to the disposition of the will, the other to its execution. We might hesitate much in adopting this method of construction, were it not sanctioned by the authorities cited in behalf of the appellants: the doctrine contended for is fully supported by the Commentary of Toullier, on the 1044th article of Code Napoleon, which we have already shown to be precisely similar to that of our own Code on the same subject. See 5 *Toullier*, p. 645, 646, and 647, *nos.* 689, 690, 691, and 692.

From this examination of the cause, it is readily perceived that the law against substitution is inapplicable to the question before the court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be avoided, reversed and annulled; and that the case be remanded to the court of probates, to be proceeded in *de novo* according to law.

Watts and *Lobdell*, for the plaintiffs.

Grymes, for the defendants.

A. & W. Bird's Syndic *v.* Dix's Estate. IV, N. S. 254.

COURT of Probates of New Orleans.

An agent who sells goods on credit, is not responsible to the principal until the price is received, unless the sale was made improperly.

Cecil *v.* Preuch. IV, N. S. 256.

FIRST District.

A farmer who takes in cattle to pasture for hire, must keep his ground under a good fence, and if it be not at the time he receives the cattle, he ought immediately to repair it.

Herriot *et al.* *v.* Broussard. IV, N. S. 260.

Officers of the United States are not to be considered as foreign officers.

Their certificates under seal or sign manual are sufficient to give faith and credit to instruments emanating from them in their official capacity.

An endorsement on the back of a title which remains in the possession of endorser, does not transfer the property to the endorsee.

A synallagmatic agreement, neither made double nor executed, is null.

Receipts from officers of the United States, for the payment of the purchase-money of lands under the pre-emption laws, are evidence of title, although not perfected by the issuing of a grant in form. So also, the certificates of the commissioners of the United States.

[Herriot *et al.* v. Broussard.]

FOURTH District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover from the defendant a certain tract of land, described in the petition of the plaintiffs, as being held by them by purchase from the United States. The answer contains two grounds of defence: right of possession, and title in the defendant derived from the ancestor of the plaintiffs. The judgment of the district court is in favor of the latter, from which the former appealed.

The evidence of the case establishes the *locum in quo*, and shows the manner in which possession was obtained by the defendant under an act of sale *sous seing privé*, executed by their ancestor and also subscribed by the present plaintiffs. This deed purports to convey the land in question to the defendant, in consideration of a price therein stipulated to be paid by him in annual instalments, but was never accepted or signed by him. As evidence of title in the plaintiffs, they offered two receipts, dated at New Orleans, April 20th, 1822, purporting to have been given to the heirs of A. Herriot for the purchase-money of their pre-emption right to two tracts of land, founded on the laws of congress, according to front proprietors of land situated on water courses, a right to take by purchase the land in the rear of their possessions: these receipts are signed by J. J. M'Lanahan, as receiver of money for the United States, for the district in which the premises now in dispute are situated: also two plats of survey, certified by John C. Turner, as P. D. S. for said district.

The evidence of title in the defendant is the act, under private signature, above stated, dated the 2d of July, 1819; about which time he took possession of the land, and has continued to occupy it ever since, uninterruptedly, until the commencement of the present suit.

We find on the record two bills of exception; one to the introduction of the receipts, and the other to that of the plats of survey. The objection to the receipts is based on two grounds: First, want of proof of the signature of the person who signed them, and of his official capacity; Secondly, admitting them to be genuine; they afford no evidence of title in the plaintiffs, having been transferred from them, by endorsement, to another person. As it regards the first of these grounds of opposition, it is believed that it may be assumed as an axiom, that officers of the United States ought not to be held, in the exercise of authority or performance of the duties of their offices, as foreign, in relation to the citizens or public officers of the states individually. Officers appointed by the power, and in conformity with the principles of the general government, are officers for the whole United States collectively, and for each state separately, so far as their functions relate to the interest of the states separately, or that of the citizens of each state, and *quoad hæc*, they are officers of the state, and as such are presumed to be generally known and recognised; for the governed ought to know their governors and the authority by which they act.

Considered in this light, their acts must be received as authentic, when properly certified; and where they are not bound by law to keep a seal of office, a certificate or act, under their sign manual, is sufficient to give full faith and credit to written instruments emanating from them in their official capacity. The just foundation of this entire faith and credit rests on the testimony of public officers, in relation to matters submitted to their charge, which cannot be rejected, except on suggestion and proof of fraud, falsehood, or forgery. We are therefore of opinion that the judge *a quo* did not err, in admitting the receipts of the receiver of public moneys for the United States on the first ground of opposition. The plats of survey stand on the same footing with the receipts; and the question respecting their admissibility must receive the same solution.

The right of pre-emption was given to front proprietors, by an act of congress, passed in 1811, and was limited to three years, but was afterwards revived, by an act of 1820, and limited to two years. Under this latter act the plaintiffs in the present case seem to have perfected their purchase, and thereby acquired title from the United States. What may be the legal effect of the endorsement on the receipts which they held for payment of the purchase-money to the United States, it is not now necessary to inquire; being clearly of opinion that it does not operate a transfer of their title to the land for which the payment was made. It is not a legal conveyance of real estate, either in form or substance; it does not, on the face of it, purport to be such; it has not been accepted in writing by the endorsee. We therefore conclude that the judge *a quo* did not err on the second ground of objection, in receiving these receipts as evidence of title in the appellees.

Let us now examine the defendant's claim. He relies on a right of possession and a right of property. Having been more than a year in peaceable possession, he has, by our law, acquired the right of being maintained in his occupancy against all persons without title, against whom his possession is adverse; but this right must yield to title, or the right of possession of those under whom he claims; for if they have not legally transferred to him their rights entire, he can only be received as their tenant at will or at sufferance. The possession or right of possession of the ancestor of the plaintiffs, at the time of the execution of the deed *sous seing privé* depended on the extent of the grant under which he held the land fronting on the river; this did not embrace within its limits the property now in dispute, he therefore had no title to it; consequently no constructive possession, and it is not pretended that he had actual seisin. At that period he had not even the means of acquiring title; for the right of pre-emption, granted by the act of 1811, was lost by limitation or prescription. As he had neither title nor possession at the time of the pretended sale to the defendant, he could not transfer those rights; the appellant is therefore not a possessor under him. But if the act of sale be good in law, and binding on the contracting parties; in

other words, if it were a deed completely translative of title, then the title subsequently acquired by the appellees, under the act of congress of 1820, ought to inure to the benefit of the defendant. We are, however, of opinion that the plaintiffs were authorised to consider that act as a nullity. It is literally and essentially synallagmatic; the obligations created by its very terms are reciprocal warranty on the part of the seller; and promises to pay the price in instalments by the purchaser. To have given it validity in its origin, it was necessary that it should have been executed in as many originals as there are parties having a distinct interest. Civil Code, p. 306, art. 227. There is no evidence that it was thus executed: it has never been signed by the vendor, although it contains stipulations on his part to pay the price of the thing sold; as he is not bound by it, in consequence of withholding his signature, the other contracting party may withdraw his consent and consider the act as null and void in truth as never having been executed. The inherent defect arising from want of duplicity is not cured by execution or performance by the defendant, of his obligations; he has not paid the price. The present case differs widely from those cited and relied on by the appellant's counsel, viz., Bradford's Heirs *v.* Brown, 11 *Martin*, 217; Baudin *v.* Roliff, 1 *N. S.* 165; and Oldham *v.* Croghan, 3 *N. S.* 517.

According to this view of the case, it is seen that we consider the receipts for payment of the price of pre-emption claims of land, as conferring title on the purchaser, although not perfected by a grant in form. So the courts of the state have been in the habit of receiving as evidence of title certificates of the commissioners appointed by the government of the United States, for the adjustment and settlement of land claims, which have always been admitted as authentic documents.

The defendant's claim for remuneration, on account of ameliorations or improvement on the disputed premises, was properly rejected by the court below. He is not one of those possessors to whom our laws accord such a right: he knew that he held without title, for he did not accept that intended to be conveyed by the ancestor of the plaintiffs, either expressly or tacitly, by paying the price stipulated.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Eustis, for the plaintiffs.

Watts and *Lobdell*, for the defendant.

Shepherd *v.* Percy. IV, N. S. 267.

FIRST District.

This case turned on allegations made by defendant of fraudulent contrivance between the plaintiff and Millaudon, which characterised as void, false and simulated, a sale of certain premises which plaintiff now sought to enforce. *Decided*, an agent appointed to superintend the sale at auction of an insolvent's estate (such was Millaudon, the real purchaser) cannot become a purchaser.

The COURT say:—The appellee contends that the appellant has no real interest in the cause, as he purchased, not for his own account but for that of Millaudon; that Millaudon, as he was one of the agents of the sellers, and the principal one, could not fairly purchase that property.

The district judge was of opinion that the evidence does not place the plaintiff in the situation of Millaudon's agent, that he is personally bound, and is at most only conditionally bound, to convey to Millaudon.

On this part of the case we think the judge erred. We believe from the evidence, and the reluctant manner in which the plaintiff has answered the interrogatories, adds much to the belief, that Millaudon is the actual purchaser, and that the plaintiff consented to lend his name to enable Millaudon indirectly to do, what they believed he could not, or ought not to do directly.

The district judge has concluded that a sale to Millaudon would have been good, because the agreement, under which he was appointed a commissioner, takes the case out of the policy and reason of the law, which forbids agents to purchase the property of their principals; that the principals had so limited his agency that he could not possibly defraud them; the hour at which the auctioneer was to strike off the property was fixed, and Millaudon could not quicken or slacken time.

It is in the evidence that, although the time could not be quickened nor slackened, the auctioneer conceived himself so much under the orders of the commissioners, as to ask their leave to cry the property a little longer.

Chabaud, Millaudon, and Henderson, or either of them, were to make all necessary dispositions, to advertise and superintend the sale, prepare the deeds, &c.; and the commissioners of the creditors of Tricou & Son, or a majority of them, jointly with Millaudon, (who, in this instance, represented alone his employers,) were the judges of the solvability of the makers and endorsers of the notes offered.

Henderson, one of the commissioners, refused his assent to the sale. It is not shown that Chabaud interfered, and Millaudon was empowered to act alone. In passing on the notes offered, neither Chabaud nor Henderson could have any agency.

We think the judge erred in concluding that Millaudon's agency was so limited, that he could not defraud his employers.

At the sheriff's sale 235,000 dollars were bid, *i. e.*, 90,000 dollars more than the price at which the plaintiff, or rather Millaudon, purchased.—Henderson, Millaudon's colleague, was of opinion the property should not be sold for less. Had not Millaudon, in determining to become the purchaser, placed his duty and his interest at variance, it is not unlikely that the former would have prevailed, and the property, the sale of which he had pledged himself to superintend for the benefit of the concerned, would not have been sacrificed.

Millaudon having the power of acting alone on the trust, had in our opinion, an immense latitude, and if disposed to avail himself of it, had his employer's interests perfectly at command.

A sale of a property exceeding in value 200,000 dollars, when put up in block, must find a purchaser within a very limited circle; 119 slaves sold individually, and exhibited to the bidders, may, perhaps, bring a higher price than when put up in a lot.

Millaudon had the advantage over other bidders, that on the part of his employers, at least, there would be no very rigid inquiry, into the solvability of the maker, or endorser of the notes, he might offer if he purchased. For of this, he was the only judge. He offered himself as an endorser, and we think that whatever may be his solvability, he had no authority to sit in judgment on it.

Perhaps as he was joined to two other individuals, one of whom dissented from the sale, and either had a power to act alone, he might have declined to act and purchased at a sale superintended by the third alone.—This third person, Chabaud, does not appear to have acted; but if he had, he could not have given perfection to the sale; for he was not authorised to judge of the solvabilities of the persons, whose names were on the notes offered. As to this, the defendant, and his coproprietors had given no authority to any one but Millaudon.—*Cur. Phil. Com. Terr. Factores; Pothier Vente, no.* 13; Civil Code, 349, art. 14; Harrod *et al. v.* Norris's Heirs, 11 *Martin*, 297.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment for the defendant, with costs in both courts.

Grymes and *Seghers*, for the plaintiff.

Denis, for the defendant.

EASTERN DISTRICT, MARCH TERM, 1826.

Ory *v.* Winter. IV, N. S. 277.

A note made in another state is governed by the laws of that state, although endorsed to a citizen of this.

Under a plea of error, evidence may be given that an account which the maker had against the payee, was omitted in the settlement, on which the note was given.

If a tutor take a note in his own name for moneys due the minor, a debt due by the tutor, in his own right, may be offered as a defence to it.

THIRD District.

PORTER, J., delivered the opinion of the court.

This case was heard last June, and judgment pronounced at that term. Doubting the correctness of our former judgment, we granted a rehearing, and the case has been argued again, and has received all the elucidation of which we believe it is susceptible.

The action was instituted on a promissory note made at Natchez, payable to one Lloyd Gilbert, and by him endorsed to the plaintiff and appellee.

It is shown by a statute of the state of Mississippi, that the maker of a note, in that state, may set up any equitable defence against a *bona fide* endorsee, which he could offer against the payee. Laws of Mississippi, 464.

The first question in the cause is, by what laws should this contract be governed? The plaintiff contends that, as the note was endorsed

in this state, and to a citizen of it, the rights of the parties must be ascertained by the laws of Louisiana.

We are clearly of opinion it should not. That the validity of a contract must be ascertained in relation to the laws of the country where it is made, is a rule as well known, and of as frequent application in this court as any other we act under. We see nothing in the circumstance of the rights of one of the parties being transferred to the citizen of another state, which can take the case out of the general principle. The argument which attempts to do so, takes for granted the note was negotiable, in our understanding of the term, though the very object of the statute was to take from it that character. This is not the case of a citizen of one state claiming rights in opposition to those set up by a third party, under a contract made in pursuance to the laws of another country. It is a demand made under an agreement entered into in a foreign state, and consequently the party claiming rights under it must take it with all the limitations to which it was subject in the place where it was made, and that although he be one of our citizens.

But this is the least difficulty the case presents. The two principal points in the cause are, first, to the right of the defendant to offer the defence relied on, under the pleadings; secondly, to the insufficiency of the proof to make good that defence, supposing it admissible.

The defendant pleaded:

That the note sued on, was given in error, in settlement of accounts with the payee, Lloyd Gilbert, and should only have been given for the sum of 840 dollars.

Under this plea, depositions of sundry witnesses were offered in evidence, to show that an account which the defendant had against the payee was omitted in the settlement. The plaintiff objected to this proof being received, because the fact was not put at issue by the pleadings. The court below sustained the objection; and gave as a reason for doing so, that pleas should be so certain that the opposite party might be apprised of the nature of the defence set up, and of the proof that will be probably introduced.

One of the most valuable features of our jurisprudence, is the simplicity with which parties are permitted to bring their rights before the tribunals of justice. Those technicalities which, in other countries, embarrass and obstruct the progress of justice, are unknown to it. All it requires is, that each party should allege his grounds of attack or defence so specially, that the adversary shall not be taken unawares, by matters springing up on the trial of which he was not apprised by the pleadings; and that the judgment which may be rendered on the issue joined, will enable him, against whom it has been given, to protect himself by the plea of *res judicata*, should a subsequent demand be made for the same thing.

These are the only rational objects to be attained by pleading specially; and no matter what may be the nature of the suit, or the defence opposed to it, the rules just mentioned furnish the proper test

by which the legality of the party's allegations may be ascertained. A good deal of the argument addressed to us by the counsel of the appellee, went to show that the plea offered was nothing more or less than a plea in compensation, and should have all the certainty of time and circumstance which a defence of that nature requires. We do not think this plea, in substance, one of compensation; for a debt existing anterior to the time when a note was given on settlement of accounts, may be pleaded as a diminution of the original debt, as well as offered in compensation of the claim evidenced by the note. But under whatever name offered, it should have that certainty which will enable the party to whom it is opposed, to know what is opposed to him, and to protect him against another demand for the same cause.

That the pleadings in this action would afford the plaintiff complete protection, if sued again for the same thing, we have no doubt.

The defendant avers, the note was given in error, on a settlement of accounts; that it should have been for 840 dollars, instead of 2843 dollars. This plea in substance admits, that, allowing the defendant credit for all claims which he had against the plaintiff, previous to the execution of the instrument sued on, there would still be a balance due to the latter of 840 dollars. Should a subsequent suit be brought for any debt existing anterior to that date, this judgment could be successfully opposed to it; for as the defence includes all demands, there are of course none left for future litigation. The Spanish writers consider this mode of pleading, as that by which the party against whom judgment was given, would be most effectually secured against other actions for the same matters and things. And a law of the *Partidas* tells us, that if the plaintiff claim a thing generally, and fail in his proof, he can never after renew his suit for the same thing; for, by setting up a general claim he includes all others he may have to it. *Part.* 3, *tit.* 2, *ley* 25; *Curia Phillipica*, p. 1, *sect.* 11, *verbo Libelo, no.* 7.

But the very circumstance of the answer being so general in its nature, as to enable the plea of *res judicata* to be easily supported, is the principal cause why the other object required in pleading has not been so well attained. It certainly would have been more formal, and we may add more correct, to have given the particular grounds which had occasioned the error in the settlement. But as the only reason for requiring this exactness, (in the point of view in which we are now considering the rule,) is to guard against surprise; if it appears from the circumstances attending the progress of the cause in the court below, that in point of fact the plaintiff was not surprised, but had ample information of the grounds on which the defendant claimed a deduction, we do not think the latter should entirely lose his claim, or be turned round to litigate it in another action. It would be permitting the plaintiff to use that as a sword which was given him as a shield. Now it is most conclusively shown, by the fact of taking depositions to support the defence long before the trial, at the

taking of which, the plaintiff by his counsel attended, that he was fully apprised of the grounds on which the defendant relied. In the case of Ralston *v.* Barclay, decided in this court, where the pleadings were more informal than those now under consideration, it was held, that as the record showed the counsel for defendant had perfect knowledge of the charge, they were called on to contest, the evidence would not be excluded, though, without circumstances which established this knowledge, the proof could not have been received. By the rules of the Spanish jurisprudence, if the allegations in the pleadings were too general, either party had the right to require that the particular grounds on which his adversary relied should be set forth. It is unnecessary for the decision of this cause, and consequently would be improper, for us to say, whether that rule be still in force here; but its equity is most manifest; for there may be as much injustice done by surprising a party at the moment of trial, with such an objection, as by permitting evidence to be received, of which the pleadings did not give sufficient notice. 6 *Martin*, 649; *Febrero*, p. 2, *lib.* 3, *cap.* 1, *sect.* 2, *no.* 100.

It is next urged this proof should not have been received, because the debt was not one that could have been set off against the plaintiff's claim, and consequently there was no error in not including it in the settlement.

This depends on the understanding of the parties at the time the note was made. If it was their intention this amount should be deducted, and it was not done, there was error. The tutor novated the debt by taking a negotiable note in his own name. He was acting within the powers conferred on him by law in doing so, and if the conditions on which he agreed to this novation, were omitted by mistake, the party suffering has the right to have the mistake corrected. Whether a novation thus made is binding on the minors, is a question which need not, or could not be settled here, but as it respects the tutor, there cannot be a doubt but that he is bound by it. He is also bound by all the stipulations on which he agreed in the first instance to accept it. If he is not, then the defendant is not in any way responsible on the note. The whole agreement is binding, or the whole is void. *Pothier on Obligations*, 537; *Dig. liv.* 46, *tit.* 2; *liv.* 20, *no.* 1.

We see no error, therefore, in the former judgment of the court, except in pronouncing final judgment. As the evidence was excluded below the cause should have been remanded to give the plaintiff the opportunity of offering proof to show the defence unfounded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed that this case be remanded for a new trial, the appellee paying the costs of this appeal.

Cuvillier, for the plaintiff.

Porter and *Workman*, for the defendant.

Debuys & Longer *v.* Johnson. IV, N. S. 286.

THIRD District.

The defendant on whom citation has been irregularly made, waives the objection resulting therefrom, if he goes to trial without relying on it.

The acceptor of a bill of exchange has no right to go into the consideration between the drawer and drawee.

Davis *v.* Hampton. IV, N. S. 288.

Purchasing a horse that has been stolen, in market overt, does not give a right to him unless there be three years possession following the sale.

SECOND District.

MARTIN, J., delivered the opinion of the court.

The plaintiff claims a horse which was stolen from him in the state of Mississippi, now in the defendant's possession, or the value thereof. The defendant pleaded the general issue, and that, admitting the fact as stated by the plaintiff, still, as the defendant is the *bona fide* owner and possessor of the horse, having purchased him openly and publicly of a horse jobber, in the public highway, the defendant is at all events entitled to receive the price paid for the horse.

The plaintiff had judgment for the horse, but was decreed to reimburse the price. He appealed.

His counsel urges, the judge *a quo* erred in decreeing the payment of the price. He urges that the old Civil Code, 488, art. 75 and 76, gives title to the possessor of a chattel, after a possession of three years, unless it has been stolen; in which case the former owner can only recover it on paying the price paid, if it has been bought in a public market or from a person dealing in similar commodities. He contends it is only after a possession of three years that the purchaser may demand the price; and that the isolated fact of the defendant's

vendor having sold the horse now claimed, with others at the same time, does not constitute him a vendor of horses. It is insisted that a contrary construction would repeal the article of the Code, by making it a dead letter; as the plaintiff would then be, in every case, compelled to refund the purchase-money, and would result in the singular anomaly that the recovery of stolen property would be rendered harder than that of property lost by carelessness or accident. The circumstance of the two articles cited being placed under the title of prescription, is presented as one that supports the conclusion, and it is said, the two articles being connected by the conjunction *but*, ought not to be divided.

The appellee's counsel consider the 76th article as positive, and unconnected with the preceding.

We are of opinion the district judge erred. The 75th article provides, "that if a man has had a public and notorious possession of a movable thing during three years, in the presence of the person who claims the property of the thing; said person being a resident of the territory, is presumed to have known the circumstance of the possession, and the property becomes vested in the possessor, unless the thing has been stolen."

Article 76: "But, however, if the thing stolen has been purchased by the possessor, at a public market, at a fair, or auction, or from a person dealing in similar commodities, the former possessor can only obtain possession of the thing by paying the possessor the purchase-money."

The last article appears to us most intimately connected with the preceding, of which it is a modification. It begins by the words, *but, however;* the definite article precedes the substantive *thing.* The thing; what thing? Evidently that just spoken of; that of which there has been a possession of three years.

According to the construction contended for by appellee's counsel, the sale of stolen property would be vastly facilitated; as the former owner would be without a remedy as soon as the thief effected a sale. Thus a horse thief, if he was for a while successful, would be a dealer in horses, and would forever preclude the person the horse was stolen from, if he effected a sale of it.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and that there be judgment, that the plaintiff recover the horse; and in default thereof, the sum of one hundred and fifteen dollars. with costs in both courts.

Nicholas, for the plaintiff.

Thorn & Co. *v.* Morgan *et al.* IV, N. S. 292.

A conveyance made by a citizen of this state, in New York, though valid by the laws of that state, is void here, if made in *tiempo inhabil.*

FIRST District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiffs sue to recover a house and lot described in their petition as owners, under a title derived from John W. Oddie, an insolvent. The sheriff of the parish of Orleans, Clark the syndic of the creditors of the insolvent, and Brand the builder of the house, are made defendants. The judgment of the court below is favorable to the claim of the plaintiffs, but subjects the property to the privilege of the builder.—Both parties seem to be dissatisfied with the judgment below, and have appealed.

From the view which we have taken of the cause, it is unnecessary now to examine the claims or pretensions of any of the defendants, except that of Clark in his capacity of syndic, representing the mass of creditors of the insolvent. The act under which the plaintiffs claim title is attacked on the ground of legal fraud as having been executed by the insolvent at a time when he was in failing circumstances. It was made in the state of New York, and however valid it may be under the laws of that state, there are circumstances shown in the present case, which subject it to the control of our state laws. The insolvent was a resident of New Orleans; went to New York, executed the title for the property in dispute in due form to the plaintiffs, and in one month afterwards attempted to avail himself of the benefit of the insolvent laws of that state; returned to New Orleans and made a *cessio bonorum* in pursuance of our laws in such cases provided. All these things were done in the course of six months. It was admitted by the counsel for the plaintiffs, that a debtor could not legally and honestly go from this state into another, and there dispose of his property to the prejudice of the mass of his creditors, under the sanction of foreign laws. Such an act is in *fraudem legum nostrum*, and ought not to be tolerated. Subjecting the decision of the present case entirely to the laws of the state of Louisiana, it offers little difficulty. We are clearly of opinion, that the transfer was made by Oddie to the plaintiffs in *tiempo inhabil*, at a time when he was unable to pay all his debts, and when his property ought to have been considered a common pledge to all his creditors, according to the rank and privilege of their claims. This case differs but little

from the case of Kenner *et al. v.* Brown, 3 *Martin*, 270; and the case of Ritchie *et al.*, Syndics, *v.* Sands *et al.*, Syndics, 10 *Ibid.* 704. In the first, a mortgage given by a person who was in failing circumstances to a creditor, intended to favor him to the prejudice of the mass of the creditors, was declared null; in the other a sale was set aside, on account of having been made in fraud of creditors. The attempt made by Oddie, to avail himself of the insolvent laws of New York, not more than one month after he had conveyed the property now in dispute to the plaintiffs, is such evidence of his inability to pay all his debts, as to show clearly, that he was insolvent at the time he executed the deed of conveyance.—Then all his property was a common pledge of his creditors, and no part of it could be legally transferred to any one of them to the prejudice of the rest. The deed is voidable according to the acts of 1818, and 1817, as it is by every principle of our laws relating to insolvency.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the sale of the property mentioned in the petition by John W. Oddie to the plaintiffs, be annulled and made void; and it is further ordered, adjudged and decreed, that the cause be remanded to the district court, with directions to cumulate the same with the proceedings in *concurso* of John W. Oddie *v.* His Creditors, reserving to the parties in the suit, other than the plaintiffs, the right to assert their claims on the property according to law. The plaintiffs paying costs in both courts.

Morse, for the plaintiffs.

Ripley, *Watts* and *Lobdell*, for the defendants.

Caire *v.* Bank of Louisiana. IV, N. S. 295.

FIRST District.

Held, under the charter of this bank it is not bound to pay the expense of sealing the bonds of the state, which are directed to be subscribed by the governor, countersigned by the treasurer and delivered to the defendant in payment of the portion of the state, in the bank's capital stock. He who is bound to give an instrument in writing, is bound to subscribe and seal it, if necessary. The notary is, by law, paid by the vendee: but the costs of the act include nothing which the vendor is to perform personally, or by his attorney.

Spraggins *v.* White's Executors. IV, N. S. 297.

COURT of Probates of New Orleans.

Courts have the power *ex officio* to send causes before referees, under the acts of the Legislative Council, 1804, 6; 1805, 256; Caulker *v.* Banks, 3 *N. S.* 532.

Lafarge *v.* Ripley. IV, N. S. 303.

FIRST District.

A party interrogated on facts and articles, cannot by his answer, make the copy of an instrument evidence, without accounting for the loss of the original.

Nor make conversation between himself and a third party, in the absence of his adversary, evidence against the latter.

Dennison & Commaire *v.* Nicholson. IV, N. S. 308.

FIRST District.

Quære, if goods were consigned to M'Coy & Scallan, and were sold at auction by a firm of auctioneers called M'Coy & Co., whereof M'Coy was also a partner, and payment made by the purchaser at auction, to M'Coy, is this payment to M'Coy acting in a separate capacity, a payment to the house of which he is a member, the consignees of these goods?

Wall *v.* Hampton *et al.* IV, N. S. 310.

SECOND District.

A verdict, on facts submitted, that an instrument was obtained "through fraud or error," without saying it was obtained through either *absolutely*, is void for uncertainty.

Ferguson *v.* W. & D. Flower. IV, N. S. 312.

Partners in steamboats, residing in Louisiana, are bound *in solido* for necessaries furnished the boat, in a country where the law creates that obligation.

FIRST District.

PORTER, J., delivered the opinion of the court.

The defendants, citizens of Louisiana and residents of this state, were sued as owners of the steamboat Washington, for supplies furnished at Louisville, in the state of Kentucky.

They pleaded, 1. The general issue. 2. That they only owned one-eighth of the boat, and could not be made responsible beyond the share which they had in her. Judgment was given against them for the whole amount, on the ground that the contract was entered into at a place where the common law prevailed.

The case of Carroll *v.* Waters arose under a contract entered into in this state, and was decided on the provision in the Code respecting particular partnerships. The whole doctrine has been examined in the argument of this case, but it would be improper to follow the counsel through it, for the cause must be determined on particular grounds. 9 *Martin*, 500.

It is proved in evidence, that by the laws of Kentucky, where the necessaries were furnished for this boat, part owners of steamboats are responsible for the whole of the supplies. This evidence is given without qualification, and has been received without any interrogato-

ries being put to the witnesses; whether it is by the common law or by particular regulations of that state, that one owner can be called on for the whole of the debts contracted on a voyage. As the testimony appears on record, the duty of the court is very simple and plain, and the judgment of the district court must be affirmed, with costs.

Whittlesey, for the plaintiff.

Hennen, for the defendants.

Hicks *v.* Duncan *et al.* IV, N. S. 314.

An attorney for an absent debtor may be heard in court, although no property is attached.

Affidavits made before a notary public in New York, are not sufficiently authenticated by the seal of the notary.

FIRST District.

MARTIN, J., delivered the opinion of the court.

On a writ of attachment, several persons were summoned as garnishees, none of whom admitted he had any property, or was indebted to the defendants. One of the garnishees, however, stated, he had drawn bills on them, and his being a debtor or creditor depended on the fate of these bills, which was as yet unknown.

The court appointed an attorney to defend the interest of the defendants, and this gentleman prayed that the writ of attachment might be set aside, as the plaintiff had not annexed a sufficient affidavit to his petition.

This was refused, the court being of opinion that as the sheriff's return did not show that any property was attached, the defendants were not in court, and no order could be made for or against them.

From this decision the attorney appealed.

The court having (either on the motion of the plaintiff's counsel, or without their objection) appointed an attorney to defend the interests of the defendants, it became his duty to take all the measures he might have legally taken, if appointed by them. For if that be not the case, for what purpose was he appointed? His appointment was not premature, for it might have been made before the suit was brought. Civil Code, 14, art. 8.

The answer of the garnishee who considered himself a debtor or

creditor of the defendants, according to the fate of his bills, which was as yet unknown, bound in his hands whatever he might owe to the defendants, in case of the due honor of the bills, and it was important to the defendant to loosen the garnishee's hands, if the note on which he was summoned had irregularly issued. The attorney, in our opinion ought to have been listened to when he offered to show this. In doing so, the court could do no injury, but would rather do a benefit to the plaintiff; for an illegal attachment could have no effect, and the sooner it was dissolved was certainly the better for him.

There were two affidavits annexed to the petition, one from the plaintiff, made before a notary public in the city of New York; another by the plaintiff's agent here.

The first was not duly authenticated; the signature and seal of the notary being verified by those of the clerk of the city and county. Of these, the courts of this state have no better judicial knowledge than of the notary's. The affidavit is silent as to the commorancy of the defendants.

The agent's affidavit lacks the assertion of his knowledge of what he swears to; he speaks of his belief only. This heretofore sufficed. 1 *N. S.* 98.

But now the statute requires the agent to swear from his own knowledge. Code of Practice, 244.*

We think the attachment issued irregularly.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the attachment set aside; and the plaintiff to pay costs in both courts.

Pierce, for the plaintiff.

Strawbridge, for the defendants.

* This is the first time, it is thought, that the Code of Practice is referred to in the reports. This statute (if it may be so called, as was the old Civil Code,) received legislative sanction on the 12th of April, 1824, but owing to some delay in the contractor for printing and publishing it, its promulgation was deferred for more than a year: thus, it was only on the 3d of October, 1825, that this was done in the Parish of Rapides.

United States *et al.* v. Hawkins' Heirs. IV, N. S. 317.

A judgment against two, without stating the parties are condemned *in solido*, makes each responsible for his *virile* share.

Judgments are presumed to follow the obligation they enforce. But when the prayer in the petition does not follow the obligation, this presumption does not exist.

Bail are not responsible *in solido*, unless in case of insolvency of one of them, or unless when sued, they fail to claim the benefit of division.

The service under a writ of *fi. fa.* does not divest the debtor of the property seized.

A seizure of land gives no preference over other creditors.

The United States have not a preference in an insolvent estate above the mortgage creditor.

According to the technical rules of the law of Louisiana, *the mortgagee has a right to the property of the mortgaged;* and there is no difference between his claims when opposed to the United States, and those of a mortgagee at common law.

COURT of Probates of New Orleans.

PORTER, J., delivered the opinion of the court.

The proceeds of the property left by the deceased not being sufficient to pay all the creditors, the tutrix of the minor heirs filed a tableau of distribution, in which she affixed a certain rank to several mortgage and privilege creditors. Opposition was made to the homologation of the tableau, and after hearing the parties, the court of probates confirmed it in part, and modified it in respect to some of the creditors by whom it had been opposed.

From that decree this appeal was taken.

The parties now contesting before the court, are: 1. Elliot, who by virtue of a judgment and execution issued thereon, levied on property of the estate during the life of Hawkins, claims to be paid in preference to all others. 2. The United States, who assert a right to priority of payment out of the funds in the hands of the administrator of the estate, for a balance due by the deceased as navy agent. 3. Wilkinson, to whom Hawkins gave bond, secured by special mortgage, on part of the property of the deceased.

As Elliot insists his claim is higher than all others, we will first examine it.

The judgment in which it originates, was rendered against the deceased and one Hector M'Lean who were bail for Beale, against whom Elliot had commenced an action, and it is in the following words: "Judgment to be entered in favor of the petitioner against the defendants as bail aforesaid."

Under this decree a *fieri facias* was taken out on the 17th June,

1822, on which there is the following endorsement: "Credit this writ with one half of the judgment and costs paid to the plaintiffs' attorney, and for which satisfaction is entered on record the 18th March, 1822."

On the judgment docket, the following receipt is entered, "Received satisfaction of one half of this judgment and costs of J. H. Hawkins, Esq. J. A. MAYBIN."

An alias *fieri facias* was subsequently issued, on which the sheriff returned "seized the house and lot occupied by the defendant, the sale of which was stayed by an injunction from the court issuing the writ."

A *pluries fieri facias* was afterwards taken, on which there is the following return; "stayed by order of the court."

On these facts the opposing creditors contend, that the judgment against Hawkins and M'Lean was not *in solido.*

2. That, if it was, the solidity has been renounced.

3. That the seizure gives no preference over previous mortgages, nor above that claimed by the United States.

The bail bond on which this judgment was rendered, makes express mention, that the parties signing it, were bound jointly and severally. The judgment is against them as bail, but does not say they are to pay the plaintiff jointly or severally.

It is a principle of our law, and a familiar one, that an obligation *in solido* cannot be presumed; that it must be expressed. The obligation imposed by a judgment is understood to be subject to the same rule, and a decree that two should pay a sum of money, makes each responsible for his *virile* share.

But in opposition to this presumption, it is contended that judgments are always presumed to follow the obligations they enforce; and the parties in this instance being bound *in solido*, the decree of the court must be understood to condemn them to do that which they had engaged to do.

What force this argument would have, had the petition required they should be condemned jointly and severally we need not say. But when it merely asks for judgment against both, the presumption relied on does not exist. The Roman law is express on this point, and Pothier sanctions the same doctrine. *Dig.* 17, *tit.* 1, *liv.* 59. *Pothier, Contrat de Mandat, no.* 83.

But another question remains to be solved, before this point is disposed of. The words of the petition, and the judgment, it is contended, show the demand to be *in solido*, and the decree to be according to the prayer of the petition.

Not a word is said in the rule taken against the defendants, respecting the bail bond, or the terms in which it is drawn. The defendants are called on to show cause why judgment should not be given against them as bail.

The answer contests their responsibility as charged, and the judgment condemns them as bail, to pay the plaintiff the sum demanded in the petition.

The responsibility contended for, must result then from the obligations imposed upon them as bail. Now, as such they were not responsible in the first instance to this extent. There is an express provision in our late Code, that where there are several sureties, each is individually liable for the whole debt, in case of insolvency of any one of them. The special statutes which provide for the manner of taking bail bonds, make no exception to this rule. Civil Code, 430, art. 12; 1 *Mart. Dig.* 474, 475, 476.

If this article stood alone, there can be little doubt the creditor would be obliged to show the insolvency, before he could recover the whole debt from one of the sureties, because it is only on that event he is responsible. But the next section declares "that any of them may, however, demand, that the creditor should divide his action, by reducing his demand to the amount of the share and portion due by each surety, unless they have renounced the benefit of division." Civil Code, *v.* 430, art. 12.

This confusion has arisen from copying the second section literally from the Napoleon Code, and changing the first. It is certainly no easy matter to give a satisfactory construction to such enactments. The first declares the surety only responsible for the whole amount on a certain event. The next provides that he may nevertheless claim the benefit of division if sued for the whole; that is, that he may exercise a right which the preceding section would seem to have rendered useless. Civil Code, 430, art. 12; *Code Napoleon*, 2205, 2206.

And yet this provision must have been introduced for some purpose. The soundest rule of construction require us to presume so, and so to construe laws, that no part of them if possible should be vain, and without effect. We conclude, therefore, it was the intention of the legislature to make the co-surety responsible in two cases for the whole amount. 1. If any of those bound with him were insolvent; and 2. If, when sued, although that event had not taken place, he failed to claim the benefit of division. Any other construction would leave the second section without effect.

The division was not demanded here, nor could it have been successfully, for the obligation made the sureties responsible in *solido*. We, therefore, think the judgment bound each for the whole amount.

The second question is free from any difficulty. The creditor is not deemed to remit the debt *in solido* to the debtor when he receives from him a sum equal to the portion due by him, unless the receipt specifies, it is for his part. Civil Code, 28, *v.* art. 3.

We have now to examine the effect of the lien created by the seizure made on the house and lot, and the operation of the execution on the personal property not seized.

At common law the seizure under a *fieri facias* divested the debtor of his property, but the mere delivery of the writ to the sheriff did not. Supposing us governed by that system, the right to property in this instance would not be changed, for no seizure took place. But the

effect which our writs of execution should have, is prescribed by the positive laws of the state.

These laws declare that the writ of *fieri facias* shall, from the time of the delivery to the sheriff, bind and be a lien on all personal property of the person against whom the same shall be directed into whosesoever hands the same may come.

These expressions *ex vi terminorum* excluded the idea, that the property is transferred by seizure. If any part of it was, the whole would not be made subject to the lien, as property of the debtor. Again, according to another provision of the same act, the purchaser at sheriff's sale acquires the right, title, and interest which the debtor had to the thing sold, at the time the writ is delivered to the sheriff. Now, it cannot be presumed, the legislature intended to divest the debtor of the title which the purchaser was to acquire. Such an enactment would be worse than useless. Nothing found in the Spanish law, or the writers who comment on it, supports the idea, that seizure makes any change in the property. By a law of the *Recopilacion*, goods taken in execution were directed to be sequestered, inventoried, and deposited with some responsible person, and the adjudication transferred the property of the debtor to the purchaser. *Curia Phillipica, p.* 2; *Juicio Executivo, sect.* 16, *no.* 19; *Nova Recop.* 4, 22, 7.

As to the land which was actually seized, the statute provides, that from the time the judgment is docketed "all real property and slaves within the territory, belonging to the person against whom said judgment shall be so seized and docketed, shall be bound and liable for the said debt and costs, in whosesoever hands they may have come for one year;" and by a subsequent section it is provided, "that the seal by the sheriff, shall vest in the purchaser all the right, title, and interest of the person against whom the execution issued at the time of docketing." The observations already made in regard to movable property, apply with equal, and perhaps additional force to these provisions, and it appears to us, exclude the idea of the seizure making any change in the title. But the principle contended for, does not apply, even in countries governed by common law, to immovable estate, and the distinction grows out of the difference between that species of property and movables; the one passing by delivery, the other by deed. 4 Mass. Rep. 402; 8 Johns. 548; 2 *Martin's Digest*, 170, 172.

We are, therefore, of opinion that the seizure of the land affords no preference over other creditors; nor did the docketing of the judgment give any over the United States: for if that act gave a mortgage, it could have no effect against third parties, as by a provision of the Code, posterior in time, it is declared, that judicial mortgages cannot operate against third parties, except from the day they are registered in the office of the register of mortgages. If it conferred a lien inferior to a mortgage, the United States have the preference over it on the principles already decided by the Supreme Court of the Union. Civil Code, 454, art. 14.

[United States *et al.* v. Hawkins' Heirs.]

We proceed, therefore, to examine the claim of the United States. It is founded on an act of congress, which gives a preference to the general government, in the funds of an insolvent or deceased person's estate. Ingersoll's Abr. (ed. 1825) 561.

A decision of the Supreme Court of the United States has been referred to in argument, in which it is declared, that the claim of the government yields to that of a mortgagee creditor. But on the other side it is contended, that though such is the case as it regards mortgages at common law, it is different in respect to ours; because, in the former the debtor is divested of the title, whereas, in this state it remains in him, and the reasoning used by the court, in the decision of that case, is offered in support of this distinction. Thelluson *v.* Smith, 2 Wheaton, 426.

There is little or no difference in the effect of the common law mortgage and our hypothecation, though the form of the instruments by which they are created is not the same, and the mode of enforcing them different. Both are considered by the debtor, and the creditor, as securities for the payment of a debt or obligation, or the discharge of some duty; and though, according to the doctrines of the English jurisprudence, the law views them in one light, and equity in another; yet both mortgagor and mortgagee know, that the legal consequences flowing from an act, which in form, is a conditional sale, are controlled by the operation of other principles, that are as binding on the parties as if the same rules were prescribed by an act of parliament. Douglas, 600, 1; Powell on Mortgages, 220; Civil Code, 452, 1.

The attempt, therefore, to make the mortgagee creditor in this state, yield to the claim of the United States, is founded on distinctions purely technical. But when our mortgage is closely examined, it will not be found to differ so materially from that of the common law, as on the first consideration it would appear to do.

But before we go into the examination, it is proper we should state, that we disclaim all intention of putting a different construction on the statute from that given by the Supreme Court; for as the question arises on an act of Congress, it is our duty to follow the exposition which they have given of it. As that tribunal said, in a very late case, "the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Hence the construction given by this court to the constitution and laws of the United States, is received by all as the true construction; and hence the construction given by the courts of the several states, to the legislative acts of these states, is received by us as true, unless they come in conflict with the constitution, laws, and treaties of the United States." 10 Wheaton, 160; see also 16 Johns. 248; 17 *Ibid.* 108.

That court has decided that the claim of the United States should be postponed to the mortgagee creditor, and that it had preference over the judgment creditor claiming a lien. It has not, however, as yet decided the question, whether a special or qualified property in

part of the debtor's estate, would enable the creditor to be paid before the government. The question, therefore, is still open to us. The distinguished jurist who argued on behalf of the United States, in the case against Fisher's assignees, expressly disclaimed all intention of contending that the priority given by statute would operate against the pawnee, and it is clear that he has nothing but a special property in the thing pawned. Even if the question had been decided adversely to such right, in property under contracts at common law, it would be undecided in relation to a claim presented under our system of jurisprudence; for our rules are as different on this head as can be easily supposed. In the former, for example, though the object of the deed of mortgage is to secure the payment of a debt, and its effect nothing more, unless the mortgagor chooses, the mortgagee is considered in law as the real owner, because the form of the instrument confers it. In the latter, as will be hereafter clearly shown, though the form of the instrument does not transfer the title, yet from technical rules growing out of the contract, as first understood and recognised in the civil law, the right of the mortgagee in the thing mortgaged, is considered to this day the same as that of the vendee. Whether this be an anomaly in our jurisprudence, or not, is a matter of little consequence; for if the effect of our hypothecation be as just stated, the mortgagee must have the same preference here as in the common law states, according to the principles already established by the Supreme Court of the United States. 2 Cranch, 358; 3 *Ibid.* 73; Wheaton, 426.

According to the early doctrines of the Roman law, the right of the creditor in the thing hypothecated was considered to partake so much of the nature of a complete acquisition of title and property, that it could not be obtained by a naked agreement. Tradition was necessary, on the maxim, *non nudis conventionibus, sed traditionibus. Pothier, Traité de l'Hypothèque, cap.* 1, *sect.* 1, *art.* 1, § 1.

An edict of the prætor subsequently permitted hypothecation to be formed by convention, without possession following the act, but no other change was made. The character originally belonging to the contract still attached to it, and the right conveyed and acquired, was styled *jus in re; Pothier, loco citato.*

The principle, as far as we can learn, has been adopted and maintained by every nation in Europe, whose jurisprudence is drawn from the same source as ours.

Basnage, in his *Traités des Hypothèques, ch.* 6, defines a mortgage, "*jus reale quod fundum sequitur, adversus quemcumque possessorem.*"

Neguzantius, a distinguished Italian jurist, gives the following definition, the accuracy of which has been applauded by other writers who treat on this contract. "*Et quia hypotheca constituitur desuper rebus, ideo dicitur, jus in re, seu jus reale, vel actio realis quia per illam non obligatur persona debitoris, sed res, et sequitur fundum, et datur contra possessionem.*" *Part.* 1, *no.* 3.

Of the same opinion is Heineccius, "*Quod ad reliqua attinet, jus in re ex pignore et hypotheca idem nascitur. Heineccius, Recit. lib.* 3, *tit.* 15, *no.* 822.

The French jurists, who have commented on the Napoleon Code, from which the articles in ours on the same subject do not materially differ, approve of these definitions, and expressly state that a mortgage is a real right, *jus in re.* Civil Code, 452 and 3; Code Napoleon, 2114; *Grenier, Traité des Hypothèques, part* 1, *cap.* 1, *no.* 4; *Persil, Régime Hypothècaire, cap.* 3, 2414.

The Spanish writers recognised the same distinction, and the hypothecary action is classed among those denominated real. *Febrero, p.* 1, *cap.* 4, *sect.* 4, *no.* 70. To the same effect is *Heineccius, lib.* 2, *tit.* 1, *no.* 334.

Again, according to the writer last mentioned, *ubi jus mihi est in re, ibi res mihi devincta est; ubi jus ad rem persona obligata, no.* 333.

And, in accordance with all these authorities is *Pothier*, who, in his treatise *Du Droit du Domaine de Propriété*, tells us, that the *jus in re* is the right which we have in a thing, by which it belongs to us, at least for certain purposes, (*au moins a certains égards,*) *chap.* 1, *no.* 1. And he classes among those who have the *jus in re* the vendee, and the mortgagee creditor. *Pothier, loco citato, no.* 2.

From these authorities we think the conclusion is irresistible, that according to the technical rules of our law, the mortgagee has a right to the property mortgaged.

And it was no doubt from this consideration, that neither in imperial Rome, nor in France, nor in Spain, did the government claim for debts due to it, a preference over the creditor who asserted a right in virtue of a conventional mortgage, unless the act embraced future as well as present property, in which case the *Fisc* was preferred, on that acquired subsequent to the date of the mortgage. But the right even to that extent was a question strongly controverted among the Roman jurists. *Curia Phill. Commercio Terrestre, lib.* 2, *cap.* 12; *verbo Prelacion, nos.* 29 and 30; *Febrero, p.* 2, *lib.* 3, *cap.* 3, *sect.* 2, *nos.* 115, 116 and 117; *Domat. lib.* 3, *tit.* 1, *sect.* 4, *nos.* 21 and 22; *Dig. lib.* 20, *tit.* 4, *law* 21; *Ibid. lib.* 49, *tit.* 14, *law* 28.

If, then, according to the technical rules of our jurisprudence, the mortgagee creditor is considered, to use the language of Pothier, as the owner for certain purposes of the thing mortgaged, we are unable to perceive any difference between his claims when opposed to the United States, and those of a person holding a mortgage at common law.

It was contended on the argument, that the judicial mortgage of our laws differed in no respect from that by convention, and that if the mortgage in this case had been of the former kind we should have precisely the case of Thelluson *v.* Smith, where a judgment in Pennsylvania which gave a lien was postponed to the claim of the United States. To this we answer that, it is true, the judicial mortgage of our law does not differ from the conventional, except in the

manner in which it is formed; but both our conventional and judicial mortgage, differ from the lien of the common law, in the rights which they confer in the property. The latter gives no *jus in re*, it is an obligation, tie or claim, annexed to, or attaching upon the property. *Jacob's Law Dict.* vol. 4, *verbo Lien*, 159.

If to this reasoning it be still objected that the effects of a lien given by a judgment at common law, and the effect of our judicial mortgage are the same, and that the distinction drawn between them is refined and artificial; the reply again is, that the mortgage at common law, our hypothecation and the lien conferred by judgment, are nearly alike in their effects. But if the Supreme Court of the United States felt itself bound to give the mortgage at common law a preference in consequence of the form in which it is made, we do not feel authorised to shut our eyes to those technical rules, which make the mortgagee in the view of our law, owner for certain purposes, of the thing mortgaged.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, with costs.

Eustis and *Strawbridge*, for the United States.

Preston, for Elliot, and *Ripley* for Hawkins' Heirs.

Jordan *v.* White. IV, N. S. 335.

An action for damages done to goods on board, is not barred by the prescription of one year.

If the steamboat be destroyed by fire, and the clerk is dead who kept the books, parol evidence of the contents of them may be received.

In a suit against the part owner of a steamboat, another owner is a good witness for the defendant.

Partnership books are good evidence between partners.

The mate is a good witness for the captain, in a suit against him for negligence.

PARISH Court of New Orleans.

MATHEWS, J., delivered the opinion of the court.

The plaintiff in this case, claims payment of wages earned by him as pilot on board the steamboat Teche. The answer of the defendant, who is part owner of the boat, contains three species of defence: a general denial, a plea of compensation and one in convention.

The evidence of the case, as it appears on the record, shows that services have been rendered by the plaintiff in the manner set forth in his petition, but the testimony in relation to their duration and value is somewhat variant. Much of the evidence offered on the part of the defendant in support of his pleas of compensation and reconvention, was rejected by the court below, and judgment rendered in favor of the plaintiff, from which the defendant appealed.

In order to ascertain whether final judgment should be given on the appeal, or the cause should be remanded for a new trial, it is necessary first to examine and decide on the bills of exception which appear on the record. The first two were taken by the counsel for the plaintiff; one to the admissibility of any evidence on the plea in reconvention, alleging that the right of action on which it is based is lost by prescription. This is in truth a plea of prescription, and in support of it, a principal reliance is placed on the twenty-second law, *tit.* 9, *part.* 7. This title treats of slander, libels, &c., and does not in our opinion embrace the cause of action set forth in the reconvention of the defendant; it more properly belongs to that class of injuries done to the property of individuals known under the denomination damages, *Daños* in Spanish, and is not destroyed by prescriptions of short periods. The judge *a quo* was, therefore, correct in admitting evidence in support of that plea. The other exception of the appellee is to the admissibility of the testimony of the witness Shaw, who was offered to prove that he had seen a receipt in the receipt book of the Teche, purporting to have been given and signed by the persons whose property was injured by the misconduct or negligence of the owners of the steamboat, or their agents, acknowledging remuneration of the damages by them sustained, &c. The evidence on record, establishes the fact of the destruction of the boat by fire, and also the death of the clerk who kept the books of said boat. Under these circumstances, it is believed, that oral testimony was legally resorted to, to prove the former existence of the receipt and its contents; therefore, there is no error in the opinion of the judgment thus excepted to.

We come now to the exceptions taken on the part of the defendant. The first is to the rejection of the testimony of two witnesses offered in favor of the appellant, on the ground of incompetency, as having been part owners of the steamboat Teche, with the defendant in the present case. Their testimony seems to have been excluded by the judge *a quo*, under a belief that they are incompetent on account of interest. It is true, as settled in the case of Rochelle & Shiff *v.* Musson, 3 *Martin*, 73, that one partner in commerce, cannot be legally received as a witness for his copartners; but this rule of evidence is confined to cases where their interest is common in the suit, wherein they are all to gain or lose by its event; the rule is the same both at common law, from which we borrow much in relation to evidence, and in the Partidas. See *Partidas* 3, *tit.* 16, *l.* 21. In a suit by one part owner of a vessel for the portion of freight to which he may be

entitled, or for damages which he may have suffered by the negligence of the master or commander, the other owners are not directly or indirectly interested in the event of such suit. It is true they might in that way support each, the other's claims; but this is a circumstance that must go to affect their credibility, not competency, as witnesses. We are therefore of opinion, that the judge erred in rejecting the testimony of the two witnesses, L. and M. Robitaille.

The next exception is to the opinion of the judge, by which he refused to admit two books of account, said to have been kept by Clifford, the clerk of the boat, who is since dead. Proof was offered of his handwriting. These books purport to show the transactions of the boat at a time when the appellee was a part owner and commander, and consequently were under his immediate care and inspection. The books of a partnership are certainly, *prima facie*, good evidence between the partners, and might be conclusive, unless it should be shown that the entries in them were made in error or fraud. We think the judge erred in rejecting the books offered. The third and last bill of exceptions, exhibits a question not so easy of solution as either of the others. It is to the opinion of the judge, by which Peck, the mate of the boat was allowed to testify for the plaintiff, in relation to the alleged injury done to the cargo, and for which the owners made amends at the time when the plaintiff was captain or master.

There is a general rule of evidence, founded on the convenience of trade, that agents and servants may be received as witnesses for their principals and masters, without a release of responsibility for apparent misconduct or negligence, where the affairs conducted by them have been in the ordinary course of business. This rule has its exceptions, one of which is, that in an action against a principal for negligence of his agent or servant, the latter is not competent to disprove the negligence, as the verdict might be given in evidence in an action by the defendant against the witness as to the quantum of damages, and he is directly interested to defeat the action. See Phillips' Evidence, p. 95. According to this exception, the plaintiff, in the present case, could not have been admitted to testify for the owners of the boat in an action against them, for loss occasioned by his alleged negligence; and if the mate be answerable over to him for the negligence complained of, on the same principle, the latter is not a competent witness. But we are inclined to believe that, as all persons employed in the navigation of vessels are the direct servants of the owners, in different grades of authority, on a charge of negligence against any one of them, the others are competent to prove or disprove such negligence. The mate was, therefore, legally admitted as a witness. Consequently there is no error in the opinion of the judge *a quo* on this bill of exceptions.

The whole evidence of the case, as given in the trial in the court below, appears on the record, and we might proceed to give final judgment on the appeal. But as part of the testimony offered by

the defendant was improperly rejected, which if it had been admitted might possibly have been rebutted by evidence in the power of the plaintiff, it is believed to be the safest and most proper course to pursue, to remand the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the case be remanded for a new trial, the appellee paying the costs of this appeal.

M'Caleb and *Byrnes*, for the plaintiff.

Carleton and *Lockett*, for the defendant.

Williams *v.* Trepagnier. IV, N. S. 342.

FIRST District.

Held, a party who is not injured by a judgment cannot procure its reversal in the Supreme Court.

Louisiana State Bank *v.* Morgan, Dorsey & Co. IV, N. S. 344.

FIRST District.

On an application to remove a cause to the United States Court, evidence must be given that the defendant is a citizen of another state.

The appellant may bring up either the original petition of appeal, or a copy. See 584th article of the Code of Practice.

Hazard *v.* Boyd. IV, N. S. 347.

PARISH Court of New Orleans.

The partner of my partner is not my partner. *Digest*, 50, 17, 470.

Garderre *v.* Foucher *et al.* IV, N. S. 352.

SECOND District.

Held, a vendee who is not evicted cannot resist payment of the purchase-money.

Also, a suit dismissed is the same as if it had never been instituted.

Parham *v.* Murphee. IV, N. S. 355.

The authority of an attorney at law, cannot be disputed while he acts within the limits of his duties. But it makes no part of them to swear to the facts on which an attachment issues.

A power of attorney, executed before a justice of the peace in another state, is not a record or a judicial proceeding, under the act of congress.

Possession of a note is *prima facie* evidence of title to it, but not evidence the possessor is acting for a third party.

THIRD District.

[Parham v. Murphee.]

PORTER, J., delivered the opinion of the court.

This action was commenced by attachment, and the defendant pleaded in abatement, that the affidavit on which the writ issued was not sworn to by the agent of the petitioner.

The affidavit appears to have been made by the attorney at law of the plaintiff, and it is contended,

1. That the court will not permit the authority of attorneys regularly admitted to practice, to be contradicted, unless on affidavit.

2. That the agent was duly appointed, and legal evidence was offered of the fact.

3. That the possession of the notes sued on, is sufficient evidence of authority to bring the action, and every thing requisite to bring it legally and effectually.

I. The court will not permit the authority of an attorney at law to be disputed, while acting within the limits of the duties which his profession imposes on him. The moment he goes beyond them, the presumption which attaches to the regularity of his conduct, and the authority under which he acts, ceases. It is not a part of the duty of an attorney at law to make affidavits on which a writ of attachment may issue. As such his oath is insufficient. The statute requires the proof to be made by plaintiff, his agent, or his attorney in fact. Acts of 1817, 26, sect. 2; 1 *Mart. Dig.* 518, sect. 4.

II. The evidence of the agent's appointment is said to be furnished by a power of attorney executed in the state of Alabama. On the face of it, the instrument purports to be signed, sealed and delivered in the presence of A. W. Bell, justice of the peace. The clerk of the county court of Franklin, in that state, certifies that A. W. Bell, was an acting justice of the peace at the time of taking the acknowledgment, and that full faith and credit should be given to all his official acts, as such.

A certain James Davis, who styles himself judge of Franklin county court, certifies that Nafford is clerk, that his attestation is in due form of law, and that full faith and credit should therefore be given to his official acts, as such.

This is neither a record nor a judicial proceeding of another state, it is consequently not embraced by the act of congress of the 26th May, 1790. It is not the record, nor exemplification of an office book which may be kept in any public office of a state not appertaining to a court; it is therefore not included within the provisions of the act of 1804, supplementary to the act prescribing the mode in which the public acts, records and judicial proceedings of another state shall be authenticated. Ingersoll's Abridg. 1825, 298, 299; Woolsey *v.* Paulding, 9 *Martin*, 294. We think the power was not legally proved, and we pass to the third and last ground.

III. That the possession of the note was sufficient evidence of the agency. The notes are not endorsed by the payee, and if the fact of possession were sufficient to establish the agency, it was almost unnecessary to provide as our law has done, how attorneys in fact

should be constituted; for in the greater number of cases, acting in the character of agent would be sufficient to establish the authority to do so. Possession of notes and obligations is *prima facie* evidence of title to them, but not evidence the possessor is acting for a third party. The enumeration in our Civil Code of the various ways in which the contract of mandate is formed, seems to exclude the idea that it is to be presumed from the mere fact of possessing the thing which forms the object of the mandate. None of the writers we have been able to consult, who treat on the subject of agency, consider possession as evidence of authority; on principle, we see no ground to consider it such. Livermore on Agency, vol. 1, 36; *Pothier, Traité du Mandat*, 28, art. 36; Civil Code, 420, chap. 1.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the attachment granted in this case be dissolved, and that there be judgment of nonsuit; the plaintiff paying costs in both courts.

Hiriart and *Eustis*, for the plaintiff.

Preston, for the defendant.

Duncan's Executors v. Poydras's Executors.
IV, N. S. 359.

FOURTH District.

Held, a motion to dismiss an appeal is, in the appellate court, what a plea in abatement is in that of the first instance. It is a dilatory exception and ought to be made *in limine litis:* it comes too late afterwards.

Bailly *v.* Robles *et al.* IV, N. S. 361.

FIRST District.

Facts communicated by the client to the attorney in his professional character, cannot be given in evidence by the latter, although he does not receive a fee.

If the point really at issue was not contested in the court below, and the evidence is not satisfactory, the Supreme Court will remand the cause.

Sloan *et al. v.* Adams. IV, N. S. 365.

FOURTH District.

On a question of fraud, if the jury find for the defendant, and the court cannot agree with them, the cause will be remanded.

Rieffel *et al. v.* Boissiere. IV, N. S. 366.

COURT of Probates of New Orleans.

No appeal can be taken from an order of the judge homologating the inventory made by the executor. No relief can be had until after final judgment.

Spencer *v.* Lambert. IV, N. S. 366.

THIRD District.

No appeal from a decision refusing to sustain exceptions to the petition: such judgment not being final.

EASTERN DISTRICT, APRIL TERM, 1826.

Martinez *v.* Layton & Co. IV, N. S. 368.

After insolvency, the syndics may sue for any property, the alienation of which was null and void as to creditors.

But when the object of the action is to enforce a lien, which one of the creditors may have on immovables alienated before failure, they cannot.

When a judgment is the basis of the mortgage, that judgment may be given in evidence against a third possessor.

A mortgage cannot be enforced on property, which previous to the date of recording had been sold by act *sous seing privé* and delivered.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The first question which this case presents, is whether after the failure of the debtor, a mortgagee creditor can exercise his action of mortgage against property, which is in the hands of a third possessor; or whether it should not be prosecuted by the syndics of the insolvent.

We think the action is properly maintainable by the individual creditor. The property, having passed out of the debtor before the cession, did not make a part of his estate. The syndics have, therefore, no authority to intervene, on the ground that they have a right to sue and get it into possession, as the property of the bankrupt. They could not support the action on the principle that it was a debt due to the estate, for there is nothing due by the third possessor to it.

If the suit was to bring back into the common mass, the land on which the mortgage existed, because the alienation was fraudulent, or from any other reason which made it null and void as to creditors, the syndics would be the proper plaintiffs for such purpose. But for the objects sought to be attained by this suit, we cannot imagine any legal ground on which they could sue. The right asserted, belongs exclusively to the creditor who has brought the action against the third person, who is not the debtor of the insolvent. The circumstance of the creditor having the power, if he had chosen, to present his claims in the *concurso*, does not authorise the syndics to interfere with, and control the exercise of rights which he has deemed proper to enforce against third parties; no more than if the vendee of the insolvent was suing to recover possession from a third person, of the object purchased.

The second question, whether the judgment rendered against the debtor could be given in evidence against the third possessor, is of very easy solution. The answer is furnished by an express provision of our Code, which declares, that "the seizure of the mortgaged property shall be ordered by a judgment, on the producing of a copy, in due form, *of the act of mortgage*, as well as of the judgment obtained against the principal debtor." When a judgment in the first instance is the basis of the mortgage, as was the case here, it is the act of mortgage, and consequently was legally admitted in evidence. To sustain the objection, would be tantamount to declaring, that judicial mortgages could not be enforced on property which had passed into the hands of third parties. Civil Code, 462, art. 43.

The third, and by far the most important question in the cause remains: it is, whether a mortgage which has been duly recorded, can be enforced on property, which, previous to the date of recording, had been sold by act *sous seing privé*, and was in the possession of the vendee at the time the mortgage was registered.

In the case of Doubrere *v.* Syndics of Grillier, it was decided, that the chirographic creditors of an insolvent could not set aside a *sous seing privé* act of their debtor; that they did not possess such a right before failure, and that their rights were not increased by that event. In the opinion delivered in that case, which received our most serious attention, many of the topics that necessarily belong to this, were considered, and a good deal of the reasoning used there, has a strong application to the instance now before us. 2 *N. S.* 171.

Still, the point there adjudged, is not the same as that which is necessary to the decision of this cause; and the express reservation which we made of such a case as that presented at this moment to the court, shows, that we then considered a decision on the rights of creditors, who had neither privilege or mortgage on the real estate of their debtor, would not be decisive as to those, who with such advantages should hereafter contest the effect of an act under private signature.

According to our Code, "The mortgage is a contract by which a

person affects the whole, or only some part of his property, in favor of another. Civil Code, 452, art. 1.

Another provision of the same work declares, that sales of immovable property may be made by authentic act, or under private signature. Civil Code, 344, art. 2.

Now, where there is a sale by *sous seing privé* followed by delivery previous to the date of the mortgage, the thing sold has ceased to be the property of the mortgagor, and it is as we have already seen, only his property that can be affected by it.

If these were the only provisions of our law on the subject, the case would be one of the greatest clearness, and the decision which we should necessarily give on it, would be conformable to the principles of our ancient jurisprudence; according to which a sale followed by delivery gave a complete right to the thing, and neither alienation nor mortgage subsequent to such sale and delivery, could affect the thing in the hands of the first purchaser. This principle came from Rome, where, as it is well known, the maxim was, *traditionibus..... dominia rerum, non nudis pactis transferentur. Partida 5, tit. 5, c. 20; Febrero, p. 1, cap. 7, sect. 1, no. 21; Gomez Var. lib. 2, cap. 2, no. 20; Code, liv. 2, tit, 3, l. 20.*

But the change which has taken place in the condition and affairs of society from the vast extension of commerce, and the great use of credit in modern times, has induced several of the modern nations of Europe to introduce a new and much more complex doctrine in relation to the alienation of immovable property; and cases are contemplated, where, though the sale is declared perfect between vendor and vendee, and the thing actually belongs to the latter, it yet remains the property of the seller, so far as third parties, possessing particular rights, are concerned. We have adopted this principle in our legislation.

The counsel for the mortgagee creditor has referred to the Code, page 344, art. 2, which treats of the effect of a sale under private signature. Before examining it, and it will be found very material in the decision of the case, it is necessary to recur to other provisions of our law in relation to acts *sous seing privé.*

The 224th article of the Civil Code, p. 306, is taken *verbatim* from that of the *Napoleon*; it is in these words:

"An act under private signature, acknowledged by the party against whom it is adduced, or legally held to be acknowledged, has between those who have subscribed it, their heirs and assigns, (*ayans cause,*) the same credit as an authentic act."

The 228th article of the same page declares "that sales of immovables and slaves, *sous seing privé*, shall have effect against third persons only from the time of their being registered, but that the want or delay of registering cannot be pleaded by any one of the contracting parties, their heirs and assigns, (*ayans cause.*)

These provisions are the same with those which have occasioned so much discussion among the jurists of France. The strength of the

argument on both sides, is no doubt given to us in the works of Toullier and Merlin, which have reached this state; and it is believed that an attentive perusal of them will either leave men's minds in as much doubt and difficulty here, or lead to as great a diversity of opinion, as they have done in the country where this discussion has arisen.

It is contended by one class of the French jurists, that the words *ayans cause*, mean all those, to whom the rights of a person have been transferred by a particular title, such as legacy, donation, sale, exchange, &c. Hence they conclude that the second purchaser or mortgagee, being the *ayant cause* of his vendor, cannot under the provision already cited, plead the want of registering of an act *sous seing privé.*

Those who maintain the opposite doctrine, insist, that the second purchaser is a third party (*tiers*), and that he is enabled to allege the want of registering of the act under private signature.

It would be of little utility, if it were practicable, to bring within the compass of a judicial opinion, the various arguments and authorities on which the advocates of the respective doctrines just alluded to rely. In the ardor with which the discussion is conducted, both parties will be found, perhaps, to have fallen into contradictions not easily reconciled; and to have arrived at conclusions, which in their whole extent, it is difficult to accede to.

It is said, for example, that the mortgagee creditor, by convention, is the *ayant cause* of his debtor, but that he who makes a seizure in virtue of a judgment, is not; yet it is perhaps difficult to perceive the difference on which this distinction is founded; for the seizure is made under a contract formed with the debtor, and the person to whom he obliges himself would appear to be as much *his ayant cause*, as the creditor by mortgage. *Toullier, Droit Civil Français, vol.* 8, *cap.* 6, *sect.* 1, *nos.* 247, 251, 252; *Pailliette, note* 7 *on the* 1328*th art. Code Napoleon.*

But this inconsistency is still less striking than that exhibited by the advocates of the opposite doctrine. They contend that the seizing creditor is the *ayant cause* of the debtor, but they insist that as to any act made by him under private signature, the former can plead the want of registry. This argument would appear to be completely at war with the admission, that the creditor is the *ayant cause* of the vendor; for if he be, the law expressly says, that the act *sous seing privé* is as binding on him, as on the party who signs it. Indeed, on a perusal of the whole of the discussion on this side, it will be seen that its advocates rely rather on the intention of the law maker, and the inconveniences which would result from adopting the principles of their adversaries, than on the strict meaning of the terms used. It is true, they endeavor to show that even on technical grounds, their position is tenable; but we apprehend, that in this point of view, the strength of the case is with their opponents. *Toullier, Droit Civil, vol.* 10, *p.* 613 *to* 670; *Merlin's Questions de Droit, verbo Tiers, vol.* 6, 388.

Bailly *v.* Robles *et al.* IV, N. S. 361.

FIRST District.

Facts communicated by the client to the attorney in his professional character, cannot be given in evidence by the latter, although he does not receive a fee.

If the point really at issue was not contested in the court below, and the evidence is not satisfactory, the Supreme Court will remand the cause.

Sloan *et al.* *v.* Adams. IV, N. S. 365.

FOURTH District.

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COURT of Probates of New Orleans.

No appeal can be taken from an order of the judge homologating the inventory made by the executor. No relief can be had until after final judgment.

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THIRD District.

No appeal from a decision refusing to sustain exceptions to the petition: such judgment not being final.

EASTERN DISTRICT, APRIL TERM, 1826.

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After insolvency, the syndics may sue for any property, the alienation of which was null and void as to creditors.

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If the suit was to bring back into the common mass, the land on which the mortgage existed, because the alienation was fraudulent, or from any other reason which made it null and void as to creditors, the syndics would be the proper plaintiffs for such purpose. But for the objects sought to be attained by this suit, we cannot imagine any legal ground on which they could sue. The right asserted, belongs exclusively to the creditor who has brought the action against the third person, who is not the debtor of the insolvent. The circumstance of the creditor having the power, if he had chosen, to present his claims in the *concurso*, does not authorise the syndics to interfere with, and control the exercise of rights which he has deemed proper to enforce against third parties; no more than if the vendee of the insolvent was suing to recover possession from a third person, of the object purchased.

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Still, the point there adjudged, is not the same as that which is necessary to the decision of this cause; and the express reservation which we made of such a case as that presented at this moment to the court, shows, that we then considered a decision on the rights of creditors, who had neither privilege or mortgage on the real estate of their debtor, would not be decisive as to those, who with such advantages should hereafter contest the effect of an act under private signature.

According to our Code, "The mortgage is a contract by which a

great degree from English authorities; and although in the case above stated, merchants' books ought probably to be received in evidence, the rule cannot with propriety be extended to the reception of extracts from such books. We are, therefore, of opinion that the court below was correct in rejecting the extracts of accounts from the books of Riley, so far as their authenticity depends on the entries of clerks proved to be dead.

The testimony of the clerk, Adams, could not properly have been excluded on the ground of incompetency in the witness; but allowing it to be admissible, and giving to it all the weight to which it is legally entitled, it does not help the cause of the appellant. The witness proves nothing arising from his own knowledge, which can be admitted to disprove the absolute transfer of the note to the plaintiff, by the written contract, created by the endorsement. On that subject, he only states that the entry in the deposit account against Herring, which relates to this note, is in his handwriting, and of course it is to be presumed that it was ordered by his employer, who is not at liberty in that way to make a title for himself.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Morse, for the plaintiff.

Pierce, for the defendant.

Lawes *et al. v.* Chinn. IV, N. S. 388.

THIRD District.

Husband joining with the wife in a suit, is sufficient evidence of his authorising her to bring the action.

If the plaintiff in execution, sends a writ to another parish, the district court for that parish has jurisdiction to issue an injunction, and try the questions arising on it.

A wife is not legally bound by a note executed jointly with her husband. See Durnford *v.* Gros and Wife, 7 *Martin*, 465.

Kling *v.* Fish. IV, N. S. 391.

SECOND District.

Held, that neither by the 29th law of the second title of the third Partida, nor by the Civil Code of Louisiana, is the action brought against the lessee terminated by his citing his lessor in warranty. The Code intended that the lessor should be called in warranty, and for that purpose the cause to continue, and not to terminate. If he does not appear when cited, the law afforded an equitable relief to plaintiff, by giving him possession and leaving the question of title untouched.*

Williamson *v.* Price & Morgan. IV, N. S. 399.

The owner of a vessel is responsible for the damage done by her, although a pilot be on board.

PARISH Court of New Orleans.

MARTIN, J., delivered the opinion of the court.

The defendants resisted the claim of the plaintiff for compensation of an injury done by their (the defendants') vessel to that of the plaintiff, by running foul of her, on the ground that theirs was at the time, under the care, and consequently the control of a licensed pilot. There was judgment against them, and they appealed.

They have relied on a number of authorities, principally Holt on Shipping, 481; Chitty, 59; Abbot, 227; *Partida* 5, 8, 26; *Inst.* 4, 5, 3; *Brinkershoeck* 9, 2, 29, *sect.* 2 and 4; *Dig.* 19, 2, 13, *sect.* 2.

The modern and most direct authorities support the plaintiff's claim.

If a ship miscarry, while under the care of a pilot, the merchant

* By Code of Practice, art. 68, the hypothecary action will lie against the third person, though only a tenant. See this point adjudged in Moore *v.* Allain, 10 *Lou. Rep.* 495–6.

has a right to charge either the master or the pilot. Molloy 2, 9, sect. 3.

The owners of a ship are liable for damages done by her while a pilot has charge of her, although the pilot be appointed by public authority. Story's Abbot, 215; Bussy *v.* Donaldson, 4 Dallas, 206; The Neptune, Dodson's Adm. 467; 1 Holt on Shipping, 483; 3 Peake, 302.

The owners of a ship are liable for damages done by their ship through negligence, although she be chartered by government; though a naval officer be on board and have the command of her. 5 Bos. & Puller, 182; Abbot, 182.

See also, Sewell *v.* Rich, 1 Johnson, 305; Loubridge *v.* Donville, 5 Barnwell & Anderson, 117; Carruthers *v.* Sydebotham, 4 Maul & Selwyn, 77; Bonnel *v.* Morton, Holt N. P. 259; 7 Taunton, 258; Boucher *v.* Northshore, 1 Taunton, 568; Nicholson *v.* Morrisey, 15 East, 364.

It seems hard, on the one side, that while necessity, and in many places the law, compel to place a vessel under the absolute command of a pilot, his misconduct should subject to damages the owner of the ship, on whom he is, it may be said, forced. But on the other hand, pilots are very seldom persons able to compensate the owner of a vessel ran foul of. The owner of the vessel by whom the damage is done, receiving the benefit of the voyage, it has been judged just he should indemnify persons injured by his vessel, while employed for his benefit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Whittelsey, for the plaintiff.

Hennen, for the defendants.

Verret's Heirs *v.* Candolle. IV, N. S. 402.

SECOND District.

The defendant cannot allege the nullity of the title under which he claims.

The mortgagee creditor may enforce his claim against a third possessor, by an ordinary action. See Guillet *et al. v.* Coquet, 3 *N. S.* 498.

Degruy *v.* St. Pé's Creditors. IV, N. S. 404.

COURT of Probates of New Orleans.

This was a question of marital rights. The transaction which gave rise to this controversy took place before the passage of the Code of 1808: it was, therefore, to be decided by the Spanish law alone. The appellant, in this case, wife of the deceased, St. Pé, filed an opposition to the tableau of distribution presented by the syndics. She claimed to be a privileged creditor as to paraphernal property disposed of by her husband.

The COURT say:—The position taken that the wife is a privileged creditor for her paraphernal property disposed of by her husband, is not strictly correct. The wife has only a tacit mortgage on the estate of her husband for the price of her extra dotal effects alienated during marriage. It appears in evidence, that on the 12th March, 1800, the father and mother of the appellant, made to her a donation of three arpents of land in front on the river Mississippi. In the act by which this gift is conferred, it is stated, that about five years then preceding, they had given as a pure donation, and in advancement as heirs to their daughter, the quantity of land already mentioned, that it was then unimproved, and had been estimated by the donors at the sum of 900 dollars, but that at the moment of making the deed the land had been improved, and built on, at the expense of their son-in-law.

The next day the appellant and her husband joined in an act of sale, by which they disposed of the land thus given to the former, for 4000 dollars, payable in one, two, and three years.

On these facts two questions arise.

First. Is the husband's estate responsible for the value of the paraphernal property of his wife, disposed of by an act such as that produced in evidence? And secondly, if it is, for what amount, for the value at the time it was received, or for that which it had, when improved by the joint labors of the community.

The transaction which has given rise to this controversy, took place before the passage of the Civil Code. The questions, therefore, which it presents, must be decided by a reference to the Spanish law alone. The responsibility of the husband under that system, depended much on the fact, whether the wife retained the administration of her paraphernal property; if she did, the husband was responsible in case of alienation for the amount received by him, and not otherwise. But if on the contrary, the administration of the extra dotal property was confided to the husband, he then became responsible for the price for which it was sold; unless it appeared the money

went to discharge the engagements contracted by the wife before marriage, or was in some other manner applied to her use. These principles of law were well calculated to do justice in the greater number of cases: for, except in those instances, and they are few, where the wife evidences her suspicion of the husband, by retaining the administration in her own hands, we apprehend, the husband, in almost every case, receives the price, for which the paraphernal estate is sold. The burthen of proving the contrary is, therefore, with great propriety, thrown on him. In the suit now before us, the administration of the husband is proved, by the possession which he had of the land; by the improvements which he made on it, and by his joining in the act of sale in his own right, not as assisting his wife in selling that which belonged to her. His estate is therefore responsible, as it has not been proved the price was converted to the appellant's benefit. In the case of Faussier *v.* Faussier, the notarial act showed the wife had received the money, and the language used there must be understood in relation to the facts then before the court. In that of the Planters' Bank *v.* Lanusse, the money was acknowledged to be paid to both husband and wife, but the question arose there collaterally, on the right of the wife to vote for syndics; and it was not examined with much attention, as, taking the receipt in the strongest way against the wife, her claim was supported. We understand the rule to be this: that where the administration of the wife's paraphernal estate is entrusted to the husband, he is responsible for the value, if it should be alienated during marriage; whether that alienation be made by himself, or jointly with his wife, unless it be shown that the price was applied to her benefit. (*Convertio en utilidad de la muger.*) 12 *Mart.* 167; 1 *N. S.* 350; *Febrero, p.* 2. *lib.* 1, *cap.* 3, *sect.* 1, *nos.* 43, 46 and 47; *Ayora de Part. par.* 1, *cap.* 7, *nos.* 14 and 15; *Acosta de Privil. Cred. reg.* 2, *amp.* 5, *nos.* 326 and 327; *Gregorio Lopez on the* 4 *Part. tit.* 11, *law* 17, *note* 2; *Castillo, lib.* 4, *cap.* 40, *no.* 63.

The second question is quite clear. The wife has no claim on her husband's estate for improvements made on her property during marriage. They belonged to, and made a part of the community of acquests and gains. *Ayora de Part. par.* 1, *cap.* 10; *Febrero, p.* 2, *lib.* 1, *cap.* 4, *sect.* 3, *no.* 74.

An objection was made on the part of the appellees, that the wife had lost her recourse on the husband's estate, by failing to set up this claim at the first meeting of the creditors. We do not think any such consequence should follow the neglect imputed to her. It is much more easily to be presumed, the silence of the appellant proceeded from ignorance of her right, than from an intention to abandon what is justly due to her. *Nemo presumitur facile donare.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates, be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the opposition of the appellant to the tableau of distribution filed by the syndics be sus-

tained, and that she be placed thereon as a mortgagee creditor for 900 dollars, according to the rank to which she is entitled; and it is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal.

Pierce, for the plaintiff.

Morel, for the defendants.

Clark's Heirs *v.* Barham's Heirs. IV, N. S. 411.

An order to record a will, will enable a party to plead prescription under it.

A judgment given on erroneous evidence, is valid until reversed.

When property is held by husband and wife, to which one of them has a title, possession follows the title.

THIRD District.

PORTER, J., delivered the opinion of the court.

The plaintiffs claim from the defendants the undivided half of an estate which they allege belonged to their common ancestor, Henry Clark, senior.

This claim is resisted on several grounds. First, That the estate demanded in the petition never did belong to Henry Clark; that it was the property of his son, Isham Clark, who, dying, bequeathed the same by will to his sister, Frances Barham, the mother of the defendants. Secondly, That Henry Clark renounced all right to the estate of his son Isham Clark; and, Thirdly, That the prescription of five and ten years prevents the plaintiffs from recovering.

This action was originally instituted in the court of probates, and from thence by appeal taken to the district court: in both tribunals there was judgment for the plaintiffs.

We think the objection offered to the petitioners' right of recovering on the ground of prescription, has been sustained.

The will was presented to the parish judge in the year 1816. Two of the witnesses who were present at its execution proved it. The judge made the following order; "The above will being proved to the satisfaction of the court, it is ordered to record."

It is objected, that this will cannot form the basis of prescription, because by a provision of our Code, it is declared "that no testament or codicil can have effect until it has been presented to the judge of

the parish in which the testator died. The said judge shall order the execution of the said testament or codicil after its being opened and proved in the cases prescribed by law." Civil Code, 242, art. 153.

It is the opinion of the court, that the order to record the will, was sufficient to enable the party holding under it, to plead prescription. That order is certainly not so formal as it might have been; but, no doubt exists with us, that it was the intention of the judge the will should be executed. He declares it was proved to his satisfaction, and directs it to be recorded; which order, taken most strictly, was at least commencing the execution of the will. The parties claiming under it, were justified, after this judicial sanction, in believing their title to be valid, and that they rightfully held the property. Informality in a title does not prevent him who claims under it, from pleading prescription; it is only the informality which renders it null, which produces that effect. The great number of our probate judges, and the smallness of the compensation which their fees of office afford in many parishes, render it impossible to obtain legal characters to fill them. We cannot, therefore, expect, that all their judicial decrees will be expressed with that clearness and precision, which distinguish the judgments of courts, where men learned in the law preside; and we apprehend, it would lead to great confusion to apply so severe a test to them. At all events, we are satisfied, that the order rendered here was sufficient to enable the party to plead prescription: whether it was technical enough for other purposes, need not now be inquired into.

It is next objected, that the will was defective, because more witnesses could have been had at its execution; and that the court irregularly admitted it to probate without evidence, establishing that the facts existed which render the number called in here, sufficient for the validity of a nuncupative testament when made in the country.

As far as our knowledge of the practice of the courts of probates extends, we do not believe they are in the habit of going into an inquiry of this kind when a will is presented to them. The articles of the Code, which point out the proof necessary to be made, before the execution of the testament can be ordered, do not seem to contemplate any such investigation in the first instance; but admitting that they did, what would be the conclusion? Why, that the court of probates decided erroneously on insufficient evidence. But that would not be sufficient to render the judgment null, or prevent it, until appealed from and reversed, from having the same effect as if rendered on the most full and complete proof. Civil Code, 242, art. 157.

It is still objected, that the legatees knew their father was alive at the time the will was made, or at least when it was ordered to be recorded, and that consequently they were possessors in bad faith; as the law has positively provided, the parent cannot be disinherited unless he is named in the will, and the causes of disinherison expressly mentioned. Civil Code, 236, art. 128.

[Clark's Heirs v. Barham's Heirs.]

There is no proof in the record of the fact on which this bad faith could be established. The evidence shows, that the father resided in South Carolina up to the year 1817, or 1818. Whether his children knew that he was still living, at the time the will was made or proved, is not shown: the presumption is, that they were informed of it. But we cannot take that presumption in place of proof, and on it alone say, this property was held in bad faith. Bad faith, as is well known, cannot be presumed, and there is no difference between presuming it, and presuming the fact which would establish it.

Lastly, it was contended, there was no possession, because the father of the present defendants was the husband of their mother, the legatee, and that the property came into his hands as executor, and was held by him in that capacity.

The testimony establishes, that the slaves have remained with the husband and wife, since the death of Isham Clark, the testator, up to the institution of this suit. When property is held by husband and wife, to which one has a right, the legal possession follows the title: the husband, as executor, had no right to retain them for ten years; his possession, after the time prescribed by law for executors to perform the duties imposed on them by the will, was the possession of the legatees.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

Woodruff, for the plaintiffs.

Watts and *Lobdell*, for the defendants.

Brown v. Anderson. IV, N. S. 416.

FIRST District.

Decided, the right of a defendant in a note may be sold in execution. In this case, the defendant's interest being only the forty-seventh part of the proceeds of the note, he could not himself demand the delivery of it from a person who was the first holder of it, for the holders of the remaining *aliquot* parts of it who have liens, judgments, &c. Therefore, these ought not now to be compelled to surrender it.

Whatever may be the right of the defendant in the note, may be a fair object of sale on the execution, without disturbing the right of

the holders or other owners. The rule taken by plaintiff on Lobdell, suggesting that he was in possession of a note of one M'Donough, the property of defendant and others, and requiring him to show cause why it should not be surrendered by him to the sheriff to be sold on plaintiff's execution, was discharged.

Hernandez *v.* Garetage. IV, N. S. 419.

THIRD District.

New trial will not be granted for the discovery of evidence, which by due diligence might have been had before.

The validity of a donation made in the state of Mississippi will be tested by our laws, if those of that state are not proved.

Lawrence *v.* Foster. IV, N. S. 423.

EIGHTH District.

Amendments should not be allowed unless to promote the justice of the cause, and never to indulge indolence of a party.

Chapelle *v.* Wells *et al.* IV, N. S. 426.

It is no violation of an exclusive right to keep a ferry, to cross persons without demanding toll.

EIGHTH District.

PORTER, J., delivered the opinion of the court.

This action is brought to recover damages, which the plaintiff alleges he has sustained by the defendants disturbing him in the use and enjoyment of a ferry, to which he has an exclusive right, by virtue of an act of the legislature.

The acts of disturbance are alleged to be the establishment of another ferry within the limits conceded to the petitioners, by the aforesaid act.

The general issue was pleaded; the case submitted to a jury, and by them found for the defendants, and in our opinion correctly.

The evidence shows the defendants had a boat on the river, near to the ferry of the plaintiff, and that they were in the habit of crossing there themselves and permitting others to cross; but there is no proof that they made any charge for doing so, or that they received compensation therefor. The third section of the act under which this suit is brought, prohibits any person from establishing a ferry, within the limits conferred on the plaintiff. Now to the establishment of a ferry, the taking of toll is essential. A ferry is defined to be, a liberty, by prescription or grant, to have a boat for passage upon a river, for carriage of horses and men, *for reasonable toll*. We have no doubt it was in that sense the word was used by the legislature; it never could have been their intention to prevent men from using their own boats to cross the river, nor to prevent them from lending these boats to their neighbors, so they did it gratuitously.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Ripley and *Conrad*, for the plaintiff.

Hennen, for the defendants.

Hepp *et al. v.* Lafonta's Executors. IV, N. S. 428.

FIRST District.

If a specific legacy is made of a note, and afterwards, but before the death of the testator, a payment is made on it, the legatee cannot claim that the amount of the note should be paid by the executors.

In this case, the *testator* himself received the part payment. This legacy was not of a sum of money, but of a contract or debt; it was not perfect until the moment the testator died, and then it took place as to what was *then* due; for the rest, it was adeemed. The executors having transferred the testator's claims on the debtor, to the legatee, as it stood at the time of testator's death, have nothing further to do in the business.

Schlatter *et al. v.* Broaddus *et al.* IV, N. S. 430.

FIRST District.

"Persons, out of this state, can only be made amenable to our tribunals by having *their* property attached. A writ of attachment *duly executed*, stands in the place of a citation. The credits, goods and effects of the defendants, represent his person. If they be not levied on, he is not legally before the tribunal, any more than in an ordinary case where the citation is not *served*."

Garidel *v.* Fogliardi. IV, N. S. 432.

FIRST District.

Held, creditors who sign a concordate, do not waive the right of contesting, thereafter, the claims of each other, on the syndic filing a tableau of distribution. See 10 *Martin*, 690.

Brown & Sons *v.* Saul *et al.* IV, N. S. 434.

A creditor has no right to interfere in a suit between his debtor and a third party.

Dilatory and declinatory pleas should precede answering on the merits; but when there is a total want of right disclosed by the petition, it may be taken advantage of at any stage of the proceeding.

PARISH Court of New Orleans.

MATHEWS, J., delivered the opinion of the court.

This suit was brought to recover from the defendant 9000 dollars, money alleged to have been lent him by the plaintiffs. In their petition they claim a privilege, as resulting from a pawn or pledge of four hundred shares of bank stock, in the Bank of Orleans. Before judgment was rendered between the original parties to the action, the Bank of Orleans and the Bank of Louisiana each filed separate petitions of intervention and opposition to the privilege or preference claimed by the plaintiffs, as above stated, alleging the embarrassed state of affairs or insolvency of the defendant, and imperfections in the act of pledge, as grounds of their opposition. They were permitted to intervene in the court below, and no objection seems to have been there made to their right of thus interfering with the interest and claims of the original parties. Judgment was finally rendered, supporting the opposition of the intervening parties, from which the plaintiffs appealed.

In the course of the argument before this court, it occurred to us,

that the banks, as individual creditors of the defendant, had no right thus to interfere with the administration of justice between him and other individual creditors who were pursuing their claims in the ordinary mode of legal procedure, as the plaintiffs had attempted in the present case. On further reflection and examination of the cause, we are fully convinced of the correctness of the opinion then suggested to the counsel. The soundness of this opinion is however denied by the advocates of the banks, on two grounds; one of substance, the other rather of form. In support of the substantial and legal right of the present intervention, they refer the court to the 389th and 390th articles of the Code of Practice. The first of those articles does not in any manner support the pretensions of the parties intervening; for it contemplates an interest which such parties may have, connected with that of one or other of the original parties to a suit, either plaintiff or defendant. In the case now under consideration there is no union of interest in relation to the subject matter in dispute, between the interpleaders and either of the original parties. They claim rights adverse to the pretensions of the plaintiffs, and not in unison with any real interest of the defendant. The expressions of the 390th article convey ideas on the subject of intervention, general and indefinite, and give that right in all cases where third persons have an interest in the success of either of the original parties. But the interest here intended, we are of opinion, must be direct and closely connected with the object in dispute, founded on some right, claim, or lien, either conventional or legal. It surely will not be contended, that under this law, in every case where a creditor sues his debtor, all separately, or any one of the other creditors of the same debtor, may intervene on a bare suggestion of insolvency. The interpretation, as above expressed, of these articles of the Code of Practice, is in conformity with the principles established in the Louisiana Code, particularly by the 1967th article. Admitting the want of legal authority of individual creditors to intervene, for the purpose of invalidating contracts made by their debtors, unless the claims be liquidated by judgment; it is contended, that this court cannot notice any objection founded on such want of authority, because it was not made or pleaded in defence of the intervention in the present case, before trial in the parish court. It is, perhaps, a rule, almost without exception, that all objections to the personal capacity of a suitor to appear in justice, should be made in *limine litis.* All dilatory and declinatory pleas ought to precede the *contestatio litis;* and even peremptory exceptions should be regularly pleaded; but a total want of legal right in a suitor, in relation to the matters in litigation, ought to be taken into consideration and acted on by courts of justice, at any stage of a cause. They should not remain silent spectators of infringements of the true principles of laws, which they are appointed to administer.

Being of opinion that the intervening parties in the present case had no legal right thus to come in, it is ordered, adjudged and decreed, that the judgment of the parish court be avoided, reversed and

annulled; and it is further ordered, adjudged and decreed, that judgment be entered against them as in case of nonsuit, and that the cause be remanded to the court below, to be tried between the original parties; the interpleaders to pay all costs in both courts occasioned by their intervention.

Morse, for the plaintiffs.

Rawle, for the defendants.

Pierce and *Livermore*, for the intervening creditors.

EASTERN DISTRICT, MAY TERM, 1826.

Lanusse's Syndics *v.* Pimpienella. IV, N. S. 439.

The nature of the plea of reconvention. The plaintiff against whom a plea of reconvention is filed cannot discontinue.

If an agent, who is to be paid on condition that he succeeds in the business entrusted to him, be dismissed without cause, he can claim a sum equal to the trouble he has been put to.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action was commenced to recover from the defendant, a sum of money, charged in the petition to have been received by him in the capacity of attorney in fact to the plaintiffs.

The answer admits the agency; the receipt of a sum of money amounting to 9957 dollars, 62½ cents; but avers, that the defendant's expenses in collecting the money in Mexico, and pursuing other claims of the plaintiffs there, amounted to 3999 dollars 93 cents, and that he has paid over to Paul Lanusse, the attorney of the syndics, 5953 dollars, 68¾ cents; which leaves a balance in favor of the plaintiffs only of four dollars.

The answer also avers, that the defendant was charged by the plaintiffs with the recovery of the proceeds of a cargo of a vessel confiscated by the former government of Mexico, amounting to 49,600 dollars in specie, and a quantity of tobacco; that the plaintiffs

agreed to pay his expenses in prosecuting this recovery, and to allow him ten per cent. commission on the amount which might be received by him.

That with infinite labor, trouble and expense, he, the defendant, had nearly completed the recovery of the claim entrusted to his management, when the plaintiffs annulled the power conferred on him, and appointed another agent in his stead.

That, by reason thereof, he was prevented from complying with his agreement, and that he is entitled to the same commission, as if the money had been collected. For the amount of this commission, deducting the balance of four dollars, due him on the moneys collected, judgment is prayed in reconvention.

On this answer being put in, the plaintiffs moved the court for leave to discontinue. It was granted to them; but on a rule taken by the appellee, this order was rescinded, and the cause reinstated.

The correctness of the decision which denied the plaintiff the permission to withdraw his case, is the first question presented for our examination.

Unless the situation of the parties in this case, greatly differs from ordinary ones, it was conceded on the part of the appellee, that the application should have been sustained.

The right of the defendant to reconvene the plaintiffs in the same suit, in which the latter makes a demand of him, though as clearly established by the ancient laws of this country, as any other principle to be found in them, and though of familiar use among all the modern nations whose jurisprudence is derived from the same origin as ours, has but recently been put into practice in this state. The first case in which it was expressly recognised by this court, was that of Evans *v.* Gray. The legislature have since acted on it; but they have done no more than to establish the general principles, leaving the particular questions which might arise to be decided by deductions from those general principles; or by reference to the Spanish jurisprudence where not only the same general rules are found, but the modifications, which they have received in their application to particular cases. 12 *Martin*, 483; 2 *N. S.* 73; *Dig. lib.* 2, *tit.* 1, *c.* 11; *Toullier, Droit Civil Français, vol.* 7, *liv.* 3, *tit.* 3, *cap.* 5, *no.* 346, in note; *Febrero, p.* 2, *lib.* 3, *cap.* 1, *sect.* 6, *no.* 224; *Curia Phil. p.* 1; *Juicio Civil, sect.* 15, *nos.* 7 and 9; *Code of Practice*, 374—77.

Whether the plaintiff can discontinue his action, and by this means, put both himself and the defendant out of court, will depend in some measure on ascertaining in what light he is to be viewed in relation to the demand in reconvention; whether he be not *quoad* this demand really defendant: for, if he is, it would seem to follow as a consequence, that he cannot exercise a right which is given to those who are asking for judgment against others, and who are therefore left at liberty to enforce their claims in the manner, and at the time which their interests may dictate. He stands, on the contrary, according to the hypothesis just put, in a situation where every imaginable reason is

opposed to the exercise of such a privilege. There would be few judgments we imagine, rendered in this country, or any other, if the party against whom condemnation was prayed, and against whom it was about to be pronounced, could arrest the sentence, by the expression of a wish that it should be postponed to another time, or by desiring, that the suit against him should be discontinued.

Now, with the exception, that the defendant who sets up the plea of reconvention is not the party with whom the cause originates, it is not seen by us in relation to such claim, in what other light he can be viewed than as plaintiff. In all these things, which essentially distinguish the one from the other, he certainly is: his demand is not merely that the plaintiff shall not have judgment, but that he shall be obliged to render to the defendant something which is withheld from him. On the judgment which might be rendered on this demand, the same consequences would follow as if the suit had been commenced by original petition, instead of one in reconvention.

Reconventio est petitio quâ reus vicissim, quid ab actore petit, ex eadem, vel diversa causa. Voet. in tit. de Judiciis, no. 78.

La reconvencion es segunda convencion, mutua peticion, ó nueva demanda, que el reo pone al actor en vista de la que este le puso. Febrero, p. 3, *cap.* 1, *sect.* 6, *no.* 224.

It follows, then, that every consideration which prohibits the defendant from withdrawing from a cause, applies with equal force against allowing the plaintiff to discontinue the demand presented against him; and, if the reasoning from general principles, on which this conclusion has been obtained, required any aid from the practice in the Spanish courts, the books which treat of it, are clear and express, that in those tribunals he had no power to do so. *Febrero, p.* 2, *lib.* 3, *cap.* 1, *sect.* 6, *nos.* 224, 237.

It was contended, that the right to discontinue at any time before verdict rendered, was an incident belonging to the trial by jury, and that the introduction of that mode of trial into Louisiana, brought with it this right. In the present case, no jury was prayed for; the argument, therefore, does not apply: but if it had, would the plaintiff's position be made stronger? We think not. The rights of the parties, and their control over the cause, must depend on our laws, not those of England. In that country, the plaintiff cannot be made defendant; here, as we have already seen, he may: to make the practice there, a guide for us, it should be shown, that at common law the defendant has the power to discontinue at any time before verdict. The introduction of a new mode of trial does not repeal the former provisions of our law, in relation to those matters which might be put at issue and tried in the same cause, unless that mode of trial was incompatible with the investigation of these matters. No such incompatibility has been shown here: the jury can as well try, and decide, two issues as one.

As to the decision of this court, in which it was stated, that this plea might be used as a defence against the plaintiffs' claim, no aid

can be derived from it, to support the plaintiffs on the ground assumed by them. Pleas in reconvention are of three kinds. The first is, where the defendant sets up a liquidated claim which is of greater amount than that on which he is sued, and asks judgment for the surplus. Pleadings containing such matter, embrace two things: compensation which extinguishes the plaintiff's demand, and reconvention for the balance due. The second is, where the sum set up in the answer is not liquidated, and the object of the plea is, that it should be made so, in order that the sum found due should be used in compensation of the plaintiff's claim, and the judgment should be obtained for the overplus. The third and last kind is, where the demand is totally independent of the action brought by the plaintiff; but it has been lately excluded from our practice by legislative provision. The first and second are most usually decided at the same time that judgment is given on the original demand: but, though they are both used for the purposes just mentioned, there cannot be a doubt, that for the sum for which judgment is demanded in the plea, the defendant is really and substantially plaintiff. The terms used in the laws on this subject, and by the writers who comment on them, by which the party who sets up this plea is called the defendant, and he against whom it is used, is styled plaintiff, cannot change the nature of things. These terms are resorted to from necessity, to avoid confusion in explaining, by whom, and against whom, this right can be exercised. *Code of Practice*, 376; *Toullier, Droit Civil Français, liv.* 3, *tit.* 3, *cap.* 5, *nos.* 349, 350, 351.

The amount accorded by the court below to the defendant, for the expenses by him incurred, was not much contested in argument; but that part of the judgment which allowed him a certain sum as the value of his services in the business which was not completed, at the time the power was revoked, has been urged to be erroneous. That the claim, which the court has thus sustained by its judgment, is one of the strongest equity, cannot be denied. It is difficult to imagine a case of greater injustice, than that of an agent employed on the promise of remuneration, if he succeeded in the matter for which he is engaged, being dismissed without any imputed fault; and the dismissal followed up by a refusal to pay him any thing for the care taken, the time lost, and the trouble experienced, in the service of those who wantonly discharge him. The law does not sanction such a proceeding. If, as formerly, the contract of mandate was gratuitous, and the agent had undertook to perform it without reward, the principal might put an end to it when he pleased; and as the agent had no claim for the services when rendered, he could have none for not being permitted to render them. But since the passage of our Code, a remuneration may be stipulated for the duties to be performed under this contract; and consequently, where that remuneration depends on his success, the agent has an interest that the power should not be put an end to improperly. Whether that interest extends so far as to enable him to claim the whole sum to which he would have been entitled,

had he been suffered to finish the business he commenced, need not be inquired into, as the appellee has not prayed that the judgment below should be changed; and we are satisfied, no error was committed, in decreeing to him a fair compensation for the work and labor done in the service of the plaintiffs.

The amount allowed is supported by the testimony, and does not appear to us unreasonable.

The judgment of the court below is erroneous, in being directly against the defendants; whereas it should have been, that the plaintiffs be placed on the tableau of distribution, to be paid according to their rank.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged and decreed, that the defendant in the cause, and the plaintiff in reconvention, do recover of the estate of Paul Lanusse the sum of 4615 dollars, and that he be placed on the tableau of distribution accordingly; it is further ordered, adjudged and decreed that the appellants pay the costs of the court of the first instance, and the appellee those of appeal.

Derbigny, for the plaintiffs.

Seghers, for the defendant.

Hennen *v.* Monro. IV, N. S. 449.

Testimony taken in a former cause between the same parties may be used in evidence on the second trial, provided the witnesses be dead or absent.

Goods taken out of a vessel to lighten her and put on the beach, in case of damage, furnish cause for a claim of general average.

The action cannot be defeated on the ground that there are other owners, unless the plea discloses who they are.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This is a suit instituted to compel the defendant to contribute as on general average to a loss which the plaintiff alleges he has sustained in consequence of lightening the vessel of the former, by placing on a beach certain boxes containing books belonging to him, which were received on board, to be carried from Pensacola to New Orleans on

ordinary freight; and which were damaged by being thus removed, to the amount of 629 dollars, 63 cents, &c. Judgment was given in favor of the plaintiff in the court below, from which the defendant appealed.

The facts of the case as they appear on the record, according to the evidence admitted in the district court, show, that the plaintiff put on board a sloop called the Herald, some time in October, 1821, then owned and commanded by the defendant, several boxes of books to be carried from Pensacola to New Orleans; in the vessel he came passenger at the same time; that the sloop soon after leaving port got aground, which made it necessary to lighten her, and this was effected in part, by placing the merchandise of the plaintiff on a beach as above stated, where they received the injury complained of by a sudden surge of the bay.

Some of these facts are in part established by evidence to which the defendant excepted in the court below; and it is necessary before investigating the cause on its merits to examine the bills of exceptions taken to the admissibility of certain depositions or testimony taken down in writing between the parties to the present suit, in one which was formerly instituted and finally decided, where the plaintiff claimed recompense against the defendant to the amount of his entire loss, on the ground of alleged negligence and misconduct in the latter, as master of said sloop, &c. These exceptions are to the testimony of two witnesses, Merry and Davidson; one shown to be without the jurisdictional limits of the state, and the other to be dead. In support of his objections to the evidence, the counsel for the appellant relies principally, on the doctrine which relates to the propriety of allowing records of previous suits to be introduced, as proof in subsequent actions between the same parties: and in aid of the principles for which he contends, refers the court to 2 Johns. Rep. 24; 1 Esp. N. P. 43. On a perusal of these cases, it is found that they relate to evidence offered in support of pleas in bar, or peremptory exceptions, or at least defences partaking of the nature of such pleas. To support an exception *res judicata* not only the parties must be the same, but the cause of action must also be the same; the identical issues of fact and law, are required to have been decided on in the first action. In the case now under consideration, the testimony, as contained on the record of the former suit, was not offered in support of a plea in bar. It was tendered as proof of facts known only to witnesses, one of whom is now dead, and the other not within the reach of civil process; of facts the proof of which had been obtained from them by legal examination, in which both parties to this suit had an opportunity to interrogate the witnesses; of facts pertinent to the issue in the former suit, and equally pertinent to the issue in the present. It is evidence, so far as received, necessary to the support of both actions.

We are of opinion that the judge *a quo* did not err in admitting the depositions of these witnesses to establish facts relative to the issue in the present case. See Phillips's Evidence, p. 266; and the cases cited by the counsel for the defendant.

[Hennen v. Monro.]

Opposition, on the merits of the case, is made against the plaintiff's right to recover on a general average, and in support of this opposition, several grounds are assumed by the appellant's counsel.

1. That from the manner in which the merchandise was removed from the sloop, no cause of action occurred for a general contribution.

2. The plaintiff shows no property in the goods.

3. There is no bill of lading or proof that the captain knew that the boxes were on board.

4. Admitting a cause of action to exist, the plaintiff has mistaken his remedy, in not suing all persons who had goods on board the vessel.

Lastly, that there is error in the calculation made by the district court.

It is true, strictly considered, that there was not a *jactura mercium* of the appellee's property. A sacrifice of the goods was not intended, when they were placed on the beach. But they were removed from the vessel to relieve her from the bar on which she was aground, and to enable her to prosecute the intended voyage. The damage which they received was evidently a direct consequence of their removal, for the purpose of lightening the sloop; which produced general benefit to vessel and cargo. We can perceive no substantial difference, between a case of injury to property put into boats for the purpose of lightening a ship, and one like the present, where the damage occurred by placing them on shore, or on a beach. The former is regarded in the light of a jettison, and so should the latter. See Stevens on Average, p. 15.

As to the property in the goods, although from the evidence the plaintiff does not appear to have been the absolute proprietor at the time he shipped them, it is clear that he was conditional owner, and that the right of his taking on himself the absolute ownership, depended on his own volition. It is clear that circumstances compelled him to become complete owner before the restitution of this suit. In truth, we have no doubt of his right to maintain the present action, so far as it depends on ownership.

The evidence of Davidson supplies the want of a bill of lading, for he testifies to the receipt of the goods by the captain, and that they were in good order at the time.

The objection to the form of the action, seems to be based on the principle, that a plaintiff ought to pursue all the individuals liable to contribute on a general average in the same suit. In the present case it is not shown that he has not pursued that course; for the evidence of the cause points out no other except the defendant, who might be compelled to contribute. Many cases might arise, wherein it would be impossible for a plaintiff to pursue all liable to contribution in the same action; one readily perceived, is when they reside in different states of the Union. There is, therefore, no objection to the form of this suit, according to the jurisprudence of this state, If there be other persons liable to share the loss, they ought to have been pointed out by the defence. See 2 Holt on Shipping, p. 199.

By a calculation, based on the whole value of the sloop and freight as proved, less the probable costs of the voyage and seamen's wages, say about 200 dollars, we find an error in the estimate made by the court below of about 45 dollars.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellee, do recover from the defendant and appellant, 455 dollars, and that the appellee pay the cost of this appeal.

Hennen, for the plaintiff.

Pierce, for the defendant.

Livingston *v.* Waldon. IV, N. S. 456.

Purchasers at sheriff's sales are not responsible for irregularities antecedent to issuing the order of sale.

A sale by the sheriff of New Orleans, for taxes, is legal, if it pursue the same formalities which are directed for the sale of lands in other parts of the state.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The sheriff of the parish of Orleans having demanded from the plaintiff, payment of the taxes, wherewith he stood charged, on a list transmitted to that officer, by the treasurer of the state, under the act of 1816, chap. 47, sect. 5; 3 *Martin's Digest*, 380, no. 49; the plaintiff desired that three lots, of which he furnished a written designation, should be seized and sold. They were purchased by the defendant's vendor, and a recovery of them is the object of the present suit.

The defendant sets up his title, and prays, if it be not legal, he may be allowed the sum paid by his vendor in discharge of the plaintiff's taxes, and the value of his improvements.

There was judgment against the plaintiff, and he appealed.

His counsel has built his hope of success in procuring the reversal of the judgment, on a number of irregularities alleged to have crept into the appraisement of the property, the assessment of the taxes, and the advertisements of the sale.

As to any irregularity anterior to the transmission of the list by

the treasurer to the sheriff, we are of opinion that a purchaser at the sale of the latter, cannot be more affected by them, than the vendee on a *fieri facias*, by any error in the proceeding prior to the judgment, or in the judgment itself. We have, therefore, made no inquiry into any of the alleged irregularities, except those which are stated to have happened in the advertisements.

The plaintiff's counsel urges, that no advertisement was set up; that the sale was not advertised in the French and English languages during thirty-five days, as the law requires, in case of a sale of real property on a *fieri facias*.

The defendant's counsel shows, that the sale was advertised during the whole month of October, in French and English, in one newspaper, except on the Sundays; and in another, on the last day of September, and during the whole month of October, except on the Sundays, in the English language only.

It however appears, that in the newspaper publishing in both languages, there was an omission, as to the English language, of one day.

The plaintiff's counsel contends, that the sheriff had no other legitimate rule of conduct, in the advertisements of the sale, but that prescribed to sheriffs, by the act of 1804, in selling real estate on *fieri facias*.

The defendant's counsel urges, that land sold for the payment of taxes, is sold, according to law, after three weeks public notice at least; that this rule, the only one prescribed by law, for the sale of such land, was obligatory on the sheriff of the parish of Orleans; that he has completely followed it, and therefore, the defendant's vendor acquired a good title.

This is the only point on which the case turns.

Throughout the state, except the parish of Orleans, land is sold for the payment of taxes by the collectors, *after giving at least three weeks' public notice.* 1813, cap. 53, sect. 12.

In the parish of Orleans, the treasurer of the state is the collector. 1808, cap. 24, sect. 10. If, therefore, he should sell, he must do so after giving at least three weeks' public notice: any other rule would be arbitrary.

But to facilitate him, the legislature has authorised him to issue an execution to the sheriff; whether, on such an occasion the sheriff is to proceed as on an execution out of courts, by appraisement; and advertising during thirty-five days; whether he cannot sell, if the land do not bring a certain proportion of the appraised value, we have not inquired; for in the case under consideration no execution issued; but the land was sold under an act of assembly, 1816, cap. 47, sect. 49, which provides that the treasurer may transmit to the sheriff of the parish of Orleans, any list or lists for the collection of taxes, and it shall be the duty of the sheriff *to prosecute* on the same, for the collection of said taxes, without requiring any execution.

To prosecute on the same. How? surely not by the institution of

a suit, in the ordinary way. The poor would then be subject to more costs than the amount of their taxes. We understand this expression as synonymous with, *to proceed on the same.* How? In the manner pointed out by law to those who in other parishes have the like duty to perform; *i. e.*, by a demand, and if necessary, a sale, after giving at least three weeks' public notice.

A sale, in the mode pointed out on a *fieri facias* would be too tedious and dilatory: the property must be appraised; if it do not bring the fixed part of the appraised value, the property must be advertised, and sold on a credit. It cannot be presumed that the rule, prescribed on the sale of land for taxes throughout the state, should not be that the legislature intended to have followed in the parish of Orleans, because a particular officer was to sell. There is by far a greater analogy between the sale of land for taxes, on one side of the Mississippi by the sheriff, and a like sale by a collector on the opposite side, than between such a sale in the parish of Orleans for taxes, and one on a *fieri facias.*

We think the sheriff did not err, when being directed to sell the plaintiff's land for the payment of his taxes, he sold them in the mode prescribed by law for like sales throughout the other parishes.

And it appears to us, the sheriff, in the present case, did comply with the formalities the law requires.

He was to sell, after giving public notice for three weeks at least. It is said he set up no advertisement. The defendant offered to prove in this court that he did; the plaintiff objected to the introduction of any evidence out of the record, and we sustained the objection. The law has fixed no particular manner of giving notice. The record shows notice was given for upwards of four weeks, in two newspapers printed in the parish. We think this is a more effectual way of giving notice of the sale, than by setting up a few advertisements; several thousand copies of the advertisement were struck off, and dispersed through the parish; certainly this is as effectual a way of giving notice as can be devised.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Smith, for the plaintiff.

Hoffman, for the defendant.

Turcas *et al. v.* L'Eglise. IV, N. S. 462.

To the formation of a *concurso* three creditors are necessary, but it is not necessary they should be present at the meeting.
The insolvent may be appointed syndic.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

This case comes up without statement of facts, bills of exceptions, &c., but errors are assigned, as being apparent on the face of the record. They are:

1. That only two creditors met and voted for the appellee as syndic, when the meeting should have been composed of at least three to render the proceedings valid.

2. That the insolvent was improperly appointed syndic, as that trust can only be confided to a creditor of the estate.

3. That a man cannot be his own creditor.

We have no difficulty in giving our assent to the last position, but we cannot accede to the first and second.

I. The authority relied on by the appellants' counsel, does not support the position assumed. The author does not state that three persons are required to form a meeting of creditors. He says the insolvent must be indebted to three persons at least, and must name them in his bilan in order to form a *concurso;* which is very different from declaring the proceedings void, unless more than two out of a greater number attend, and vote for syndics. In the present case, the appellants are placed in a dilemma, fatal to this objection. If they are not creditors, they have no right to appeal. If they are, the insolvent had more than the number required by law. *Febrero, lib.* 3, *cap.* 3, *sect.* 1, *no.* 16.

II. We are also of opinion, the second objection has not been sustained. There was nothing in the law previous to the passage of that article in the Code on which the appellant relies, that prohibited creditors from appointing as syndic the insolvent himself: and that article in declaring that they may appoint as syndic one among themselves, cannot be considered as repealing former provisions from which it differs, but to which it is not contrary. The enactment that creditors may appoint particular persons, can well stand with the ancient laws that they might appoint them and others. This construction is strengthened by the consideration that since the passage of the general provision in our former Code, the legislature in acting specially on the subject of insolvency, have affixed no limits to the

choice, and in the late revision of that work, they have stricken out the words on which the appellant relies. *Salgado Lab. Credit. Concurs. part.* 1, *cap.* 13; *Febrero, lib.* 3, *cap.* 3, *sect.* 1, *no.* 26; Civil Code, 84, art. 34; Acts of 1817, 130 and 132, sect. 10 and 14; Louisiana Code, art. 417.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Seghers, for the plaintiffs.

Ripley, for the defendant.

Williams *et al.* v. Horton, Curator. IV, N. S. 464.

A donation of slaves without estimation, is void, though accompanied by delivery; for delivery cures want of estimation of property given only in case of movables.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

This suit is commenced against the curator of the estate of the absentees, in which the plaintiffs allege themselves to be forced heirs of Rebecca Horton, together with Mary Ann Spencer, who is made defendant in the action, through the medium of the curator of her estate, appointed in consequence of her absence from the state. The object of the suit on the part of the petitioners, is to have two deeds, by which Rebecca Horton in her lifetime conveyed certain property to said Mary Ann, set aside and annulled on the ground of fraud and prejudice to the plaintiffs, as forced heirs of the grantor. One of these instruments purports to be an act of sale, the other a deed of gift. The cause was submitted to the decision of a jury in the court below, who found a verdict, declaring the act of sale to be fraudulent, and that of donation to be void, on account of legal informality in its execution. On this verdict a judgment was rendered, decreeing both acts to be void, and deciding that the property intended to be conveyed by them, belonged to the succession of the vendor and donor; from which this appeal was taken on the part of the defendant.

A new trial was moved for in the district court on several grounds. 1. Because the verdict is manifestly contrary to the law and evidence of the case. 2. That it is insufficient and informal, as not having

decided on all the matters at issue between the parties, particularly in not finding that the property should be collated and partitioned. 3. Because the jury erred in rescinding the donation.

The appellants, according to the points filed in this court, seem to rely principally on the same grounds, for a reversal of the judgment of the inferior court, which were there assumed in support of their motion for a new trial. In relation to the allegation of simulation and fraud in the act of sales; being a subject most properly cognisable by a jury, unless their verdict be clearly contrary to the weight of evidence in the cause, it would not be correct for this court, or the judge of the court below, to set it aside. The whole evidence of the case, which appears by the record to have been heard by the jury, in our opinion, establishes facts from which they may have fairly inferred simulation in the deed of sale, and consequently fraud on the rights of the appellees as forced heirs of the seller. The objection made to the verdict on account of not having decreed a collation and partition of the succession of R. Horton, is wholly without foundation; for the sole, or at least principal object of the present suit, is to destroy the effect of the acts of sale and donation made by the mother of the parties: and if they be null and void, collation will have nothing to do in the case, because the property which was intended to be conveyed by them must be considered as constituting an unappropriated part of her estate.

The reasons why our legislature, in conformity with the legislation of France, should have embarrassed donations with so many forms, are not very palpable and evident to the minds of men who are only conversant with the ordinary affairs of human life; in truth, they cannot be considered as very conspicuous and imposing on those learned in the law. Why honest generosity should be thus trammelled, is not easy to account for; *sed ita lex.* In resorting to Toullier's Commentary on the Code Napoleon, it is discovered that tradition, *i. e.*, delivery *de manu in manum* of movables, according to the decisions of the courts of justice in France, dispenses with many, if not all the forms prescribed by the Code for the perfection of donations. See 5 *Toullier*, p. 181, to 184. Want of estimation of the property given, is cured by delivery of movables. The forty-eighth article of our late Civil Code is *verbatim* that of the 948th article of the French Code; except that ours provides expressly in the same manner for the donation of slaves, and requires that an estimate should be made of them and signed by both donor and donee, &c. There can be no doubt, according to the interpretation given to this law by French jurists, and which we believe to be correct, of tradition of movables obviating the invalidity of a donation, which would otherwise take place for want of an estimate. The only question which remains for examination is, whether the delivery of slaves, under a deed of grant, made and accepted in due form, will, agreeably to the general rules of property in this state, produce the same effect?

The principal reason which seems to have influenced the opinions

and decisions of those who have considered tradition of movable property made in pursuance of a will to give, as sufficient to cure all defects of form in donations, is that possession of this kind of property is held to be equivalent to title, or in other words, to be evidence of title. But according to our laws in relation to titles by which property is held, a written instrument is required in order to transfer slaves from one proprietor to another; and when the evidence offered in support of title to them is an act of donation, to give it validity, it must appear clothed with all the formalities required by law, and sanctioned by an authentic deed. Mere possession is not evidence of title. In the present case, the notarial act is invalid for want of the estimate required by the Code, and is therefore no evidence of title in the donee, because donations cannot be supported by any instrument inferior to authentic acts. In this species of contract, forms appear to assume the place of substance. From the foregoing review of the case, there can be no difficulty in perceiving the difference in the legal principles which govern it from those on which the decisions were made, relative to synallagmatic contracts, relied on by the counsel for the appellants.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiffs.

Preston, for the defendant.

Zoit *v.* Millaudon. IV, N. S. 470.

PARISH Court of New Orleans.

The law does not positively require that opposition to the report of referees be made in writing: if made *ore tenus* and no objection taken to that mode, that suffices.

The main question in this case was, whether the consignee who was agent in the purchase may sell the goods to replace his advance?

The COURT say:—In coming to a conclusion on the main question of the case, the court is much relieved from the perplexity and labor of research, which it might otherwise require, by a decision heretofore made, to be found in 8 *Martin*, 402 *et seq.*

That was a case in which the vendor of property resold it for account and risk of a vendee, who neglected to receive and take it from

the warehouse of the former. The present is one in which a consignee, who was largely in advance to the owner of goods, procured through the agency of the former, and which were not to be delivered to the latter until payment should be made by him of said advances, which formed indirectly a large portion of the price of the articles thus purchased and procured, caused said goods to be sold at the risk of the proprietor, for the purpose of effecting a fulfilment of the contract existing between the parties. This step was not taken until after due notice was given to the persons who had acted for the owner in making the contract, nor until a reasonable time had elapsed, in which the agreement should have been finally adjusted. In truth, any distinction which may be made between the two cases, forms no difference in their legal character. See the authorities referred to in the case cited. *Ex necessitate rei* the holder of the property becomes agent for the owner in the sale made.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that judgment be here entered for the appellant and defendant for 206 dollars, 20 cents, with costs in both courts.

Seghers, for the plaintiff.

Derbigny, for the defendant.

Hill *v.* Morgan. IV, N. S. 475.

It is not necessary to the completion of the contract between vendor and vendee, that the article sold should be weighed in presence of the latter.

Payment is not a suspensive condition of a cash sale.

The right of the vendor to claim back the thing sold within eight days, can only be exercised when it is in possession of the vendee.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The defendant is sued as a trespasser, having seized a quantity of coffee, which the plaintiff alleges to be his, on a writ of sequestration directed to him to seize coffee sold by Gale to Dewit. There was a verdict and judgment against him, and he appealed.

It appears Gale sold the coffee to Dewit on the 7th April, to be paid

on delivery: the delivery was completed at half past twelve on the 8th, when Dewit, being in want of money to take up an acceptance by three o'clock, sold the coffee to the plaintiff, one hour after the delivery, and one hour after it was brought to the warehouse in which the plaintiff wished to have it stored. The plaintiff stipulated that the costs of drayage and storage during one month should be paid by Dewit. After the coffee was brought to the warehouse, and partly taken in and partly left before the door of it, and the owner of the warehouse had receipted for it, the plaintiff paid 4500 dollars to Dewit, and then the sheriff seized the coffee on a writ of sequestration, on a suit by Gale against Dewit.

The defendant's counsel urges, that the coffee was still the property of Gale, because sold for prompt payment and unpaid for, and because it was sold by the pound and had been weighed by Gale, without the presence of Dewit, who never did agree to the weight.

That, if it be not the property of Gale, it is of Dewit, because, the coffee was not weighed on the second sale; because, as Dewit was to pay the drayage and storage for one month; the coffee was still in his possession, and there had been no delivery to the plaintiff; consequently no transfer of property.

It is further contended that, as the sale to Dewit was not on a credit, the vendor had a right, within eight days, to seize the coffee, notwithstanding a sale to a part purchaser.

That the thing sold is, after the agreement as to the object and price, at the risk of the vendee, is a matter of the nature, and not of the essence of the contract, and it is not less perfect, because this circumstance be excluded by a stipulation or by a provision of the law.

The sale, of a thing to be weighed, is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed. Civil Code, 2433. This is the only difference this circumstance creates; in all other respects the sale is complete and perfect.

But in the present case, the coffee had been weighed. The circumstance of its having been so, out of the presence of Dewit, might authorise him to refuse payment till the coffee was weighed before him, or till the fairness of the weight was established by legal proof, which he was unable to contradict; and as he received the coffee and sold and delivered it into the warehouse, indicated by his vendee, it is clear he discharged his vendor from the risk; and so the sale was at all events, and in all respects between him and his vendor, as perfect as if it had been weighed in his, Dewit's presence; though he was not, perhaps, concluded by the weight, and had the faculty of showing any error in it.

As to the second sale, it is in evidence that a note of the weight, from Gale's books, being furnished to the plaintiff, he was informed payment might be made thereon; if he was not satisfied, he might weigh the coffee; a circumstance which did not prevent him from receiving it, and making a very considerable payment thereon.

We think that notwithstanding Dewit was to pay for the drayage

and storage for a month, still after the coffee was brought to the warehouse, and the keeper had receipted for it, although some bags were still on the pavement, the coffee was delivered, and was at the risk, and consequently the property of the plaintiff.

Surely the promise to pay for one month's storage in a warehouse, designated by the vendee, would not leave the thing sold at the vendor's risk, without a positive stipulation. It is clear that if the warehouse had taken fire and the coffee been destroyed, the loss would have been the plaintiff's, not Dewit's; as the coffee was at his risk it was his; *res perit domino.*

We, therefore, conclude that the sales were both complete and perfect.

But it is urged that payment is a suspensive condition of a sale when no credit is given, and that till it be effected, the property does not pass to the vendee.

To this we have a contrary express statutory provision. Between the parties the sale is considered as perfect, as soon as there exists an agreement for the object and the price, although the object has not been delivered, nor the payment made. Civil Code, 2431.

This, however, is said to be a general provision to which a sale for prompt payment proves an exception. It is clear the statute does not distinguish, and we cannot see how we can.

The particular provisions made for the security of the vendor in such sales, sufficiently show he is included in the general.

Until paid, he may refuse to deliver. Civil Code, 2463.

While the thing remains in the vendee's possession, he may within eight days avoid the contract, claim the thing, and prevent its sale. Civil Code, 3196.

After eight days, the thing being still in the possession of the vendee, the vendor may demand the sale and his payment out of the proceeds, in preference to all other creditors. Civil Code, 3194.

We cannot agree to the construction urged on us by the defendant's counsel of the art. 3196. It gives the vendor the right "to claim back the things sold, as long as they are in the possession of the purchaser, and prevent the resale of them; provided the claim for restitution be made within eight days."

This does not give any right against a fair purchaser to whom the thing has been delivered. The resale may be prevented, but not set aside; to prevent a resale is the consequence of the claim for restitution, when the vendor prefers that to the payment of the price, and the statute gives this claim for restitution, as long as the thing is in the possession of the purchaser; not after.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Livermore, for the plaintiff.

Hennen, for the defendant.

Eggleston *v.* Colfax *et al.* IV, N. S. 481.

An attorney, in fact, may bring suit in his own name for the use of his principal.
The amount expressed in the bond of a curator is *prima facie* that which is due the heirs.

THIRD District.

PORTER, J., delivered the opinion of the court.

This action is instituted, on a bond given by the defendant Colfax for the faithful discharge of his duties as curator of a vacant estate. The surety is also joined in the action. There was judgment against them, and they appealed.

The first objection to the correctness of the proceedings which we are required to notice, is contained in the answer filed by the defendants. There is a plea in it that the plaintiff cannot maintain an action in his capacity as agent. That the suit should have been brought in the name of those he represented.

We do not think it well founded. Under the power of attorney, filed with the petition, the plaintiff was appointed for the special purpose of recovering the shares of his principal of the succession of whom the defendant was curator. According to the former laws of this country, and in this respect no change has been made in them, the attorney could bring suit in the name of those he represented, or in his own name for their use and benefit. It cannot be doubted that the judgment in this case, and between these parties, would enable the defendant to present the plea of *res judicata*, if sued again on the same matters by those from whom the plaintiff holds his powers. A judgment in their own name would have no other, or greater effect.

The next objection is, that there is no evidence on the record which shows the amount due. The bond itself shows this. The law requires, it should be taken for the amount of the estate as appraised in the inventory; the sum, therefore, expressed in the obligation is *prima facie* that which is due to the heirs, who are absent, unless the curator shows, what disposition he has made of the estate in his hands. Civil Code, 176, art. 134.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiff.

Woodruff, for the defendants.

M'Rae *v.* Bushnell. IV, N. S. 483.

The constitution does not authorise the court to take cognisance of any case where the object in dispute is below 300 dollars.
Whether the legislature can confer the power?—*Quære.*

PARISH Court of New Orleans.

MARTIN, J., delivered the opinion of the court.

The plaintiff alleges that the defendant has caused a *fieri facias* (obtained at his suit, against her former husband) to be levied on 6800 pounds of seed cotton, the property of her son; that her said husband died insolvent, after having taken the benefit of the act, obtained an injunction, which the defendant in action had dissolved; she appealed, and her petition alleges that the defendant is judge of the district, that includes the parish in which the judgment was rendered, and that the value of the cotton seized is sufficient to authorise an appeal from the parish court, wherefore she prays the appeal to this court.

By the Code of Practice, the judgments of the parish courts are appealable from, when the amount demanded exceeds 100 dollars, art. 568; and the legislature has said the appeal must be brought to this court, when the district judge cannot sit on it. *Ibid.*

The jurisdiction of parish courts extends to such cases only, in which the value in dispute does not exceed 300 dollars.

Our jurisdiction, by the constitution, extends to civil cases, in which the object in dispute exceeds 300 dollars.

It is very clear that the constitution does not authorise us to sustain an appeal, when the value of the object in dispute is below 300 dollars: can the legislature authorise us to do it? It is not necessary we should inquire into this; for, admitting that it can, it does not authorise an appeal from the parish court, unless the object in dispute be worth 100 dollars; nothing shows the value of the seed cotton seized. The petition alleges that it is sufficient to authorise an appeal; but this is not sworn to, and is stated argumentatively; we are only informed that, in the opinion of the appellant, it is of sufficient value; but that value should have been stated, before we could admit the conclusion.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

Woodruff, for the plaintiff.

Watts and *Lobdell*, for the defendant.

Harris's Tutor *v.* M'Kee *et al.* IV, N. S. 485.

The court of probates has not jurisdiction of a case where the heirs of a succession claim property from those who hold under a title adverse to them and their ancestor.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The petitioner claims for his minor children a partition of certain slaves in the possession of the defendants.

The right, to do so, is derived from a donation made so far back as the year 1800, to Daniel, Elizabeth, Ann, and Mary Bookter, two of whom have since died without issue. The plaintiffs are the descendants of Elizabeth, who is also deceased.

There was a plea to the jurisdiction in the court below: we think it should have been sustained.

We see nothing in the allegations of the parties, nor in the evidence adduced, which could enable the court of probates to take cognisance of the case. That court is the proper one to make a partition of a succession, where the parties claim as heirs or legatees; and no defence is made under another title, or in a different capacity. In the present case, if the minor heirs had wished to make a division of effects which they held in common, they would have been before the proper tribunal; but the object is to recover from a party who claims adversely to them and to their ancestor, and the ordinary courts can alone settle that question. The case on the part of the plaintiff is not made stronger, by supposing Bookter's succession to be interested in it; for the defendant set up a title which is equally opposed to a demand in that right. The 924th article of the Code of Practice, on which the inferior court sustained the case, relates to persons of full age who have a right in a succession. *Ante*, 234.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of nonsuit, and that he pay costs in both courts.

Bradford, *Watts* and *Lobdell*, for the plaintiff.

Preston, for the defendants.

Clamageran *v.* Bucks & Hedrick *et al.* IV, N. S. 487.

PARISH Court of New Orleans.

A third party cannot intervene in a suit, to plead peremptory exceptions on behalf of the defendants.

Malchaux *v.* Lefebvre. IV, N. S. 489.

SECOND District.

Where payment to a third party is the condition of a contract, the receipt from him is evidence between the parties contracting.

This *literal* proof was well received, and must exclude parol proof.

Conway *et al.* *v.* Chinn. IV, N. S. 491.

A judge cannot certify after judgment, that the record contains all the matters on which the case was decided, unless it appears it was tried on written documents.

SECOND District.

PORTER, J., delivered the opinion of the court.

That part of the application for a rehearing, and that only, which relates to a supposed error of the court, in considering there was no statement of facts, requires to be particularly noticed.

[Conway *et al.* v. Chinn.]

In the opinion delivered with the judgment of this court, we stated there was no statement of facts. The certificate of the judge being made out months after the trial and decree, was regarded by us as a nullity.

The law allowed the judge to certify at any time, if the cause was tried on written documents. It prohibited him from doing so, if parol evidence was heard. This record does not show the case was decided on written documents alone: no evidence appears on it. Whether any was given or not, we can only learn from a certificate, which cannot give us judicially, the knowledge of what transpired at the trial, unless the case was tried on written documents. There is perhaps not so much danger that the judge should forget the whole of the parol evidence as a part of it; but the law has made no exception, and we can make none. 10 *Martin*, 645; 3 *Ibid.*, 204; 5 *Ibid.*, 666. Whether the Code of Practice has made any change in the law need not be inquired into, as the case was decided months before it was in force.

The rehearing is therefore refused.

Watts and *Lobdell*, for the defendant.

Myles *v.* Miller. IV, N. S. 492.

EIGHTH District.

Pleas of payment and want of consideration are not inconsistent. A man may pay a note, and not discover until after the payment is made that the consideration on which he gave it was wanting.

Naba *v.* Soubercase's Heirs. IV, N. S. 493.

COURT of Probates of New Orleans.

The judgment of the inferior court will not be reversed when the evidence leaves the fact doubtful. If men will transact business in such a way as to leave their heirs and representatives entirely dependent on the good faith of those with whom they contract, they cannot expect that conjectures and presumptions will stand in the place of legal proof.

Baudin *v.* Dubourg & Barron. IV, N. S. 496.

FIRST District.

When the defendant is sued as *attorney in fact*, and the judgment is general, the judgment does not affect the defendant in his own right.

A mistake in the report of referees cannot be assigned as error.

The errors which may be assigned as apparent are only those into which the court itself falls, not those of referees, which are always cured by the submission of the party without objection.

Hicks *v.* Duncan & Sons.—Strawbridge, Appellant.
IV, N. S. 497.

Where the plaintiff in attachment is cast in the suit, the attorney for defendant is only entitled to have the fee of 11 dollars taxed in the costs.

FIRST District.

PORTER, J., delivered the opinion of the court.

This case commenced by attachment, and the appellant was appointed to represent the absent debtors. The plaintiff failed in his action, and the appellant, as attorney for the defendants, moved the court below, that he should be allowed 301 dollars, for his professional services, to be taxed in the costs, and paid by the plaintiff.

This application the judge below refused, and in our opinion most correctly. In this court it has been sustained, on arguments drawn from the uniform custom which has prevailed, of taxing in cases of this kind, the fees of defendant's counsel in the plaintiff's costs, and from considerations of the service rendered to the plaintiff, by the appellant's appearing in the cause.

The custom relied on cannot prevail against the law, which limits the tax fee to 11 dollars. The service rendered the plaintiff, by appearing and defeating him in the suit, is not perceived by the court; and even if it were a service, the act of assembly has fixed the compensation for it. The case in 3 *Martin*, contemplates that the payment shall be made out of the property seized; and, as in that case the plaintiff succeeded, there was no positive law standing in the way of the court, allowing the attorney for defendant a compensation equivalent to his services.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Strawbridge, for the plaintiff.

Livermore, for the defendants.

Bushnell *v.* Brown's Heirs. IV, N. S. 499.

Acts of limitation do not apply to matters which are presented as exceptions.
An injunction which has been granted unadvisedly, will not be dissolved if it appear from the evidence that it must be issued again.

THIRD District.

MARTIN, J., delivered the opinion of the court.

The plaintiff having obtained an injunction to an order of seizure and sale on the ground that the land sold him was deficient in quantity, and that he was disturbed in his possession of the premises by suit, and further that the sheriff levied without any previous notice to, or demand from him; the injunction was dissolved, the court being of opinion he had not supported his allegations.

This case is before us on two bills of exceptions.

The one was taken to the opinion of the court, in refusing the plaintiff an order of survey claimed, to establish the deficiency to the legal extent.

The other to the introduction of a record showing a suit brought after the injunction was obtained.

The order of survey was refused because the plaintiff suffered one year to elapse without complaining of this deficiency.

We think the district judge erred. It is true, the plaintiff could not have been heard on a suit against his vendors; but it does not follow that he could not use as a shield what he no longer could use as a weapon. *Qua temporalia sunt ad agendam, perpetua sunt ad excipiendum.*

Proceedings on injunctions are not carried on in the formal manner in which ordinary ones are conducted, but *summarily*, the strict rules of pleading are disregarded by the court. *Semper ad eventum furtivat.* It will take care that neither party be surprised or entrapped, but it disregards many obstacles to the attainment of justice. It will receive, as a ground of sustaining an injunction, that which would be sufficient to demand its instant restoration. It will not demolish to rebuild.

In the present case the plaintiff being sued had a right to resist the claim of his vendors; if he did so before suit, he was in the wrong, and ought to be mulcted into costs; but it would be vain to dissolve the injunction, for it must be enforced. Exnecios *v.* Weiss, 3, *N. S.* 480.

It is, therefore, ordered, adjudged and decreed, that the judgment

of the district court be annulled, avoided and reversed; the injunction reinstated, and the judge directed to grant the order of survey, and admit as evidence the record of the suit against the plaintiff, the defendant and appellee paying costs in this court.

Watts and *Lobdell*, for the plaintiff.

EASTERN DISTRICT, JUNE TERM, 1826.

Ure *et al.* *v.* Currell. IV, N. S. 502.

FOURTH District.

An agent who acts without authority (as in this case, under a void power, so become by the dissolution of the mandant firm, void at least in relation to those persons who were acquainted with that event) does not bind his principal even though the act was done with intent to benefit him.

Delassize *v.* Cenas *et al.* IV, N. S. 508.

COURT of Probates of New Orleans.

The sheriff having received 3000 dollars on an execution which plaintiff was entitled to, and the sheriff dying, his widow and executrix having been directed to pay it over, by the court, by an *ex parte* order, of which plaintiff had no notice: it was *decided*, that plaintiff was not bound by such order, under such circumstances, and the money was decreed to be paid to him.

Donaldson *et al. v.* Dorsey *et al.* IV, N. S. 509.

COURT of Probates of New Orleans.

The court of probates has jurisdictiou of all cases that relate to putting into provisional possession the heirs of the absentee, but it cannot try the question of title.

Parish of Orleans *v.* Kennedy. IV, N. S. 511.

FIRST District.

The fee of two dollars, imposed as a tax on suits in the Parish of Orleans by act of 1805, ceased to be demandable after the act of 1813.

Tallant *v.* Thompson & Musselman. IV, N. S. 514.

PARISH Court of New Orleans.

Held, an affidavit made before the mayor of Cincinnati does not authorise an attachment to issue on it in Louisiana. The Code of Practice, 216, 217, confines the power of taking affidavits for such objects to judges, or justices of peace of the place where the court is held, or the *judge* of any other place. The mayor of Cincinnati is not such judge.

Abat *v.* Bayon. IV, N. S. 516.

A defendant cannot amend his answer, so as to change the substance of the issue joined.
An engagement to furnish security, that the affairs of a partnership will be liquidated, is not complied with by giving bond to pay the debts of it.
He who enters on an office without proper authority, subjects himself to all the responsibilities of the situation he usurps, and cannot claim the benefits of it.

THIRD District.

PORTER, J., delivered the opinion of the court.

This case has been already before us, and was remanded. 3 *N. S.* 644.

The parties to this suit were partners, or rather owners in common of various objects, and particularly of a plantation situated in the parish of Lafourche. Difficulties arose in relation to the division of this property, and they terminated by a *transaction*, according to which it was agreed the plantation should be sold, on a credit of one, two and three years. A public sale took place in pursuance of this agreement, at which the petitioner became the purchaser of the plantation at that time in the possession of the defendant, but which, by the terms of the sale, he bound himself to deliver on the first day of January then next ensuing.

The petition states, that the defendant illegally and tortiously refused to deliver to the plaintiff the property which she had purchased; and that since the period of his refusal the buildings and improvements have been consumed by fire. She prays for a recession of the sale, and demands 8000 dollars, the damages sustained by her in consequence of the failure of the defendant to comply with his contract.

The defendant pleads:

1. That by the twenty-second article of the transaction referred to in the plaintiff's petition, the present cause, if any exist, ought to be inquired into and decided by arbitrators; and that the defendant has been always ready to answer before that tribunal, which alone has authority in the premises.

2. That the matters and things set forth in the petition, have been already decided against the respondent, in an action wherein he was plaintiff, and the petitioner defendant.

3. And lastly, that all the allegations in the petition are untrue.

When the cause returned to the district court, the plaintiff moved and obtained leave of the court, to file a supplemental or amended petition; in which she stated, that by the transaction as well as the

process verbal of the sale referred to in the petition, it was stipulated, that endorsed notes should be given for the purchase-money of the immovables sold to the satisfaction of the vendors, but that the petitioner was not obliged to give her endorsed notes, because by other stipulations in that transaction, several acts were to be done by the defendant as a condition precedent, to the delivery of these obligations on her part.

This amended petition was objected to on the part of the defendant, as changing the nature of the action; and in the points, filed in this court, this change is stated to be, that in the original petition the sale is alleged to be conditional, and by the amendment it is stated to be unconditional.

The original petition, so far from setting out a conditional sale, avers an unconditional one. The amendment discloses a condition; but avers, that there were other conditions to be performed by the defendant antecedent to that which the plaintiff was to execute, and that, consequently, the obligation on the part of the former to deliver the plantation, was complete. This amendment made no change in the substance of the action: it was only setting out the facts on which the plaintiff had a right to consider the defendant's obligation to deliver the plantation complete, at the time specified in the contract. We, therefore, think, the court did not err in receiving it.

The defendant filed an amended answer, in which he stated that all the allegations contained in the supplemental petition were untrue, and that he had not neglected or refused to comply with the conditions stipulated in the transaction. He also offered two pleas, which were rejected by the court, and the decision which refused them, forms the matter of the second bill of exceptions. The first of these pleas avers, that the plaintiff is indebted to the defendant as liquidator of the partnership in the sum of 12,000 dollars, for articles by her purchased at the auction of their property, for which he prays judgment.

The second demands judgment for 2000 dollars, against the plaintiff, the amount of the penalty stipulated in the compromise or transaction, for the noncompliance with the conditions therein expressed.

The judge decided correctly, in refusing permission to the defendant to file these pleas, because it was changing the substance of the issue joined; which cannot be done in an amended answer. Code of Practice, art. 420. The counsel for the appellant has contended, that this provision of the Code applies only to cases where the defendant seeks to amend the answer, without the plaintiff having amended the petition; but the words of the law embrace all cases, and we cannot except any. As the plaintiff is prohibited from altering the *substance* of the action by an amendment, we know no good reason why the defendant should have more liberty to change the substance of the defence, in answering that amendment, than he would in adding to his answer, to the original petition.

The third bill of exceptions is taken to a decision of the judge *a*

quo, rejecting two documents. The first of which was to show that the defendant had, in pursuance of the transaction or compromise, entered into with the plaintiff, furnished security for the liquidation of the partnership affairs: the second, to establish that the petitioner had recognised the defendant's capacity as liquidator.

To understand the force of this objection, and the correctness of the opinion of the court, it is necessary to recur to the instrument of compromise on which this suit has originated. According to the stipulations in that compromise, the land mentioned in the petition was put up at sale, and the plaintiff became the purchaser. The *procès verbal*, of the adjudication states, that the land was sold on the condition that the plantation was to be delivered on the first of January then next ensuing, the purchasers specially mortgaging the immovables, and giving their notes endorsed to the satisfaction of the sellers. It made a part of the compromise that the partners, if they purchased at the sale, should not receive possession of the property until they stated who were their endorsers, and such endorsers were approved. The defence set up in this case, is, that the plaintiff did not comply with the conditions on which she purchased, and that, consequently, the defendant was not in fault in not delivering the plantation.

In opposition to this, the plaintiff contends, that she was not obliged to give her notes, because by the seventh article of the compromise, the defendant was appointed liquidator of the succession, on the condition that he should give a sufficient surety or mortgage for the faithful settlement of the partnership affairs. She further contends, that before the time of delivering the plantation, the defendant had failed in another obligation imposed on him by the compromise: to furnish her every three months a statement of the progress he was making in the liquidation of the partnership.

We think, the court did not err in refusing to receive the evidence offered of the defendant's compliance with the conditions imposed on him by the compromise. The instrument is very informal: it is payable to no one; and the surety does not bind himself that the defendant will liquidate the affairs of the partnership, but that he will pay the debts due; which was only a part of the obligation imposed on him.

As to the other document mentioned in this bill of exceptions, it was wholly immaterial, and therefore, though the court would not have erred in admitting it, the cause cannot be sent back because it was rejected. It is stated in the bill of exceptions, that the paper was offered as evidence of the plaintiff's admission; the defendant was liquidator of the estate. The amended petition admits that he was appointed, and charges on him, as a breach of duty, that he failed to render her an account every three months as he was bound to do. Any evidence to a point admitted by the pleadings was unnecessary.

The last bill of exceptions embraces the whole merits of the case. The defendant requested the judge to charge the jury, that the obli-

gation imposed on him by the compromise was a distinct and independent obligation on his part of the breach, of which the plaintiff could take no advantage: and that his violation of the contract, was no justification of her failure to comply with the terms on which she had purchased the land. The judge refused so to charge the jury, and the defendant excepted.

According to the compromise, the defendant was appointed liquidator of the partnership affairs, on condition that he furnished security for the faithful discharge of the trust. He also bound himself to render every three months, an account of his administration. He failed to comply with these stipulations on his part, and consequently had not a right to settle the affairs of the firm. His having in point of fact proceeded to do so, without complying with the conditions on which the power was given to him, makes his case worse, and the plaintiff's stronger: for when she saw him not only failing to give the security which he had promised to do, but also going on to collect the moneys due to the partnership, she had in the apprehensions, such conduct must necessarily excite, an additional reason not to jeopardise her interest still further, and to insist on her legal rights. She was not in fault in not giving her notes, for the defendant could not have legally demanded them until he furnished security. He is therefore responsible for the consequences of failing to comply with an agreement, which he commenced violating. The plaintiff did every thing that equity could require of her, and more than in law she was bound to do. She placed notes in the hands of the parish judge to secure the defendant, in case the amount she had purchased, should on the settlement appear to be more than her share.

The defendant has insisted, that the court erred, in sustaining a suit for a single item of the accounts between the parties. This action is not an account, and the principle relied on can only be invoked by those who are acting legally under an appointment. Here the defendant was in his own wrong: he had no right to take on him the liquidation until he complied with the condition on which the power was conferred, and without which condition it is evident it would not have been conferred. The consequence of entering on an office either public or private, without proper authority, is, that he who does so, subjects himself to all the responsibilities of the situation he usurps, and cannot claim the benefits of it. He who suffers by a wrong doer, may select one, or all his acts, as the ground of action.

The first jury who tried the cause, assessed the plaintiff's damages at 3000 dollars; the last has estimated them at 3500 dollars. We think the proof supports the verdict, and do therefore adjudge and decree, that the judgment of the district court be affirmed, with costs.

Morel, for the defendant.

Dick *v.* Reynolds's Heirs *et al.* IV, N. S. 525.

On a suit against the sureties to a marshal's bond for fees collected, it is no defence that the plaintiff's claim against the United States is unimpaired.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff charges that the deceased being marshal of the United States for the Louisiana district, received from the treasury of the United States and sundry persons, several sums of money for the salary and fees of the plaintiff, attorney of the United States for the same district, which he never accounted for. The suit is insituted on the deceased's official bond.

The court of the first district nonsuited the plaintiff, being of opinion that the action could not lie, because the obligation of disbursing the public money was contracted with the United States, and they alone can avail themselves of any breach of the condition of the marshal's bond, in relation to such disbursements. The plaintiff appealed.

It is clear that if the deceased, as marshal, received the salary of the plaintiff from the treasury of the United States, and the fees due him from the clerk of the court of the United States, the defendants did him an injury by retaining the money, and this injury was a breach of the condition of his bond.

As to the deceased this obligation, though enforced by the bond, arises independently from it, from the very circumstance of his receiving the plaintiff's money, which created an obligation to pay it, and on this the law raises a promise.

As to the sureties, their obligation is said to arise from a written engagement to which the plaintiff is not a party, and that the parties alone undergo the obligations, and acquire the rights resulting from a contract. But this court have recognised in the case of the Mayor *et al. v.* Bailey, 5 *Martin*, 321, that one may have a direct action, on a stipulation in his favor, on a deed to which he is not a party, and that the congress of the United States has given the right of suing on the bond to any person injured by a breach of its condition. Ingersoll, 117.

It is vain to contend that the deceased has not impaired the plaintiff's right to demand his salary from the United States. This is certainly true; but one has often several remedies at once existing on the same right, and he may exercise either.

They further urge, that at the time the original law was passed, which requires the marshal to find bond, it was not that officer's

duty to receive and pay the salaries of the attorney; but the fact is, that the latter law making that his duty, was passed before the bond sued on was given. It, therefore, was given as a surety for the faithful payment of such moneys thereafter received, and the nonpayment of them was a breach of its condition.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; the nonsuit set aside, and the case remanded for further proceedings, the defendants and appellees paying costs in this court.

Smith, for the plaintiff.

Grymes and *Conrad*, for the defendants.

Bedford, Breedlove & Robeson *v.* Jacobs. IV, N. S. 528.

The acts of a party are good evidence when they make a part of the *res gesta*.

A new trial may be moved for, three days after judgment is pronounced, though the cause has been tried by a jury.

FIRST District.

PORTER, J., delivered the opinion of the court.

The contest between the parties to this suit has grown out of a sale of tobacco, made by the plaintiffs to the defendant. The receipt of the property is not denied, but the price is disputed.

There are several bills of exceptions on the record: the first was taken to the opinion of the judge *a quo*, permitting the plaintiffs, who are commission merchants, to prove by a witness the amount which they had paid to their principals, the same day, or the day following, the sale to the defendant.

We think the judge did not err in receiving the testimony. The declarations of the parties to a suit, when they made a part of the *res gesta*, are good evidence; and acts so unequivocal as this, are still less liable to objection. Where witnesses are not present to a contract, the real meaning and intention of the parties must be gathered from circumstances attending the transaction. Thus the conduct of the defendant, when he received the bill of parcels, was properly given in evidence. The weight to which such proof is entitled is a

quite different question; but the judge did right to let it go to the jury for what it was worth. Phillips on Evidence, 218; *Evans's Pothier*, vol. 2, 285.

The second bill of exceptions states, that the defendant offered to prove that he bought the tobacco as broker, and not on his own account; that this proof was objected to, unless it was first proved, that the names of the principals, if any there were, were communicated to the plaintiff, and that the judge sustained the objection.

The ground assumed, as the basis of this objection, is certainly correct. An agent cannot discharge himself from responsibility, on the ground that he acted for another, in making the contract, unless he shows that he communicated to the party, with whom he contracts, his situation as agent, and that he acted so as to give a remedy over against his principal. But this principle of law was applied too rigidly, when the defendant was told he must make that proof in a particular way. Two things were necessary to be established; the declaration that the defendant acted as agent, and the names of those for whom he acted. Now the proof of one of these facts must necessarily have preceded the other; and the most natural order in which they could have been presented to the court was, to show, in the first instance, that the defendant acted for others; and next, that he communicated the names of his principals. If, after establishing the first, he had failed to make out the second, his case would have been the common one of a party in court not being able to prove his whole case; but there was no obligation on him to first give in evidence the names of his principals. If he had commenced with that proof, it might have been objected with the same force, that he should first show that he communicated to the plaintiffs, he was acting as broker.

But though we are satisfied the judge erred in prescribing to the defendant the order in which he should introduce the testimony, the question recurs whether the cause ought to be remanded. It is clear that the defendant sustained no injury by the opinion of the court. If he had proof that he communicated the names of his principals, he could, under the decision made, have offered it, and it would have been of as much service in that way, as if given after he showed that he acted as agent. The whole dispute in the court below, on this point, appears to have been one of form; and it adds another to the many examples we have, of the zeal of parties, or their counsel, at the trial of a cause, raising questions which are of no importance, and burdening the record with matters that embarrass the investigation of the points on which the case really turns.

The jury found a verdict for the plaintiffs, and the defendant moved for a new trial. The court refused to permit the motion to be filed, because the same had not been made within three days after the verdict was rendered.

The correctness of this opinion depends on a correct interpretation of the rules in our Code of Practice, on the subject of new trials.

[Bedford, Breedlove & Robeson v. Jacobs.]

The 541st article provides, that "when a cause has been tried by a jury, and such jury have given a general verdict, the court must give judgment pursuant to the same within three days from the time such verdict has been entered on the records, unless a new trial has been granted." The 558th article states, "that the party who believes himself aggrieved by the judgment given against him, may, within three judicial days after such judgment has been rendered, pray for a new trial, &c." And the 546th article declares, that "the judge must sign all definitive or final judgments rendered by him; but he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given."

These provisions contemplate judgments rendered by the court on a verdict; and judgments given by the court, without the assistance of the jury. In both cases the court must pronounce judgment three days before it is signed. But in regard to new trials, they seem to be distinguished. In cases where the court hears the testimony and decides the facts, the party cast cannot move for a new trial until the court pronounces its judgment, and that motion must be made within three days. Where the jury decide the fact, the article first cited recognises the right to move for a new trial before judgment is pronounced; and that judgment must be given within three days. But both judgments are subject to the rule contained in the 546th article; that is, they must be pronounced three days before they are signed. The question is, whether the recognition of the right to move for a new trial after verdict, and before judgment, takes the case out of the general provision, that the party aggrieved has three judicial days after judgment is rendered to move for a new trial. We think it does not. The words of the law, authorising an application for a new trial at any time within three days after judgment, embrace judgments rendered on verdicts, as well as those given by the court alone. The argument *ab inconvenienti* is not so strong, as to authorise this tribunal to make an exception, where the law has made none. It is true, that, as the court must give judgment in conformity with the verdict, it would seem almost useless to give the party a right to move for a new trial, when he did not solicit it after the verdict. But there may be cases where the judgment of the court does not follow the verdict, and it may have been for such cases, this privilege was allowed. The instance before us is one of them: the verdict finds a certain sum, and on the amount found to be due, the court has added interest. The alleged error in doing so, is one of the grounds laid for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that this cause be remanded to the district court, with directions not to refuse hearing the motion for a new trial because it was not made within three days after verdict; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

M'Caleb, for the plaintiff.

Whittelsey, for the defendant

Taylor *v.* Hollander. IV, N. S. 535.

When an executor has become insolvent, the court of probates retains jurisdiction of action against him for property in his hands belonging to the estate. *Aliter* where judgment is demanded for a sum of money.

COURT of Probates of New Orleans.

PORTER, J., delivered the opinion of the court.

This cause presents two questions.

1. Whether a creditor who is not put on the bilan of an insolvent, can bring a separate suit against him before the proceedings are homologated.

2. Whether the executor of an estate, who becomes insolvent, is suable before the court of probates, or that where the *concurso* is pending.

I. The creditor who is not put on the bilan may bring a separate suit, because he is not a party to the proceedings, and is presumed to be ignorant of them; but as soon as he is informed by the answer, that the *concurso* is formed, the cause must be transferred to the court where that action is pending, and be cumulated with it. The neglect of the debtor to insert the creditor's name in the bilan, may be cured at any time before the tableau of distribution is homologated. The law has conceived it a less inconvenience that the creditor should be deprived of the right of voting for syndics, than that separate suits should be carried on at the instance of particular creditors. *Salgado.*

II. The court of probates has exclusive jurisdiction of suits brought by minors against executors for the settlement of their accounts, and the payment of the sums which may be due on that settlement. But the law provides that when an insolvent has filed his bilan and obtained an order for a stay of proceedings, *all* actions must be cumulated before the tribunal where the suit *in concurso* has commenced. To reconcile these apparent contradictions, it is necessary to distinguish. The rule that all suits should be cumulated before one tribunal, must be understood where the insolvent is sued in his own right, and not as the representative of others. Where the object of the action is to make him account in his capacity of tutor, curator, or executor, and hand over property existing in kind which belongs to those he represents, there the probate court does not lose its jurisdiction. The judgment cannot affect the creditors, for the property in his hands belonging to others, did not, nor could not, make a part of that ceded. It is, therefore, not necessary it should be carried contradictorily with those who have claims against him in his own right.

[Taylor v. Hollander.]

There is some difficulty in applying these principles to this case. The plaintiff prays that the defendant may render his account as executor, and deliver up certain notes and obligations belonging to the estate. Of this claim we think the court of probates retained jurisdiction, notwithstanding the suit *in concurso;* the petition, however, goes further, and prays for judgment against the defendant for a sum of money. Of that claim, the court of probates after the failure of the executor, could not take cognisance; it could not after that event give judgment against him in his own right. Such demands must be settled contradictorily, with the other creditors in the court where the proceedings for insolvency are carried on. But the joining this demand to the others in the petition, did not take from the court of probates the right of adjudicating on the other matters therein contained, of which it had jurisdiction; it should have proceeded with the cause and decided on those parts of the petition of which it could take cognisance, and rejected the rest: it consequently erred in sending the case before the district court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, and reversed; and that the cause be thereto remanded, to be proceeded in according to law, the appellee paying the costs of this appeal.

Hennen, for the plaintiff.

Pierce, for the defendant.

Marburg *v.* Canfield. IV, N. S. 539.

An interest in the event of the suit, alone renders a witness incompetent.

A note received for a precedent debt, operates a novation, if after receiving it, due diligence is not used to collect it, and notify the endorser.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover from the defendant the sum of 387 dollars 60 cents, which is alleged by the plaintiff to be due to him on account of cotton sold for his benefit by said defendant.

The answer contains a plea in compensation, founded on a payment made by the defendant, of debts due by the plaintiff to other

persons, as being properly chargeable in account against the latter. After hearing the evidence offered by both parties, in the court below, which was received in opposition to several bills of exception, the judge gave final judgment in favor of the plaintiff, from which the defendant appealed.

The contest between the parties arises out of a bill of exchange drawn by the plaintiff in favor of Canfield & Hill, on Stackhouse, who accepted it, and made several payments to the holder, Gascoign, who held it by regular endorsement from the payees. In the present suit, the acceptor was offered, and received as a competent witness on the part of the plaintiff, to prove full payment of said bill; and to this testimony a bill of exceptions was taken by the defendant, which, according to the examination we have made of the case, is the only exception that requires investigation. The objection to the competency of the witness, is founded on alleged interest, in consequence of his obligation to pay as acceptor. In relation to the competency or incompetency of witnesses, on the ground of interest, the most approved rules on the subject seem to exclude such persons only, as are directly interested in the event of the suit, and are called on to support that interest; or where the verdict and judgment, to obtain which their testimony is offered, would be admissible evidence in their favor in another suit. The judgment in the present case, does not necessarily affect the interest of Stackhouse, the witness. If the defendant be defeated in his plea of compensation against the plaintiff, the witness is still liable to him on his acceptance, which liability will not be affected by the judgment in the present case: if, on the contrary, the defendant succeeds in maintaining his right to compensation, then the witness remains under his former obligations to the drawer of the bill, and no more. See Chitty on Bills, p. 528, Am. edit. 1821; and Phillips's Evidence, p. 44.

We are, therefore, of opinion that the judge *a quo* did not err in allowing Stackhouse to testify in the present suit: his testimony proves payment in full of the bill of exchange, made in various manners and at different times. The truth and reality of this payment is not disputed, except as to one item, which the witness states was made on a note of one Carroway, payable at the bank in Woodville, and was received as payment by the holder of the bill, Gascoign.

The weight of evidence, as it appears on the record, is, perhaps, opposed to the truth of the assertion, that Carroway's note was received as actual payment, and operated immediately a discharge of the bill *pro tanto;* but, the whole testimony taken together, shows clearly that such a note was received by H. Jackson & Co. as agents of Gascoign, to be collected, and the proceeds appropriated to the payment of Stackhouse's acceptance. It is also equally clear, from the evidence, that the agents of the holder of the bill were guilty of great laches, or gross negligence, in not using the proper means to collect said note, and giving due notice to the endorser thereon, who was Stackhouse, the acceptor of the bill held by Gascoign, to whom he

intended that said note should effect a payment. This negligence of Jackson & Co. must be imputed to their principal, the holder of the bill. Although, probably the note was not in the first instance received as a payment, yet the laches of the holder has made them responsible to the payee and endorser for the amount; and it must now be considered as so much paid on the bill, which it was intended to pay. The principles herein recognised, are the same as those on which the case of Penn *v.* Poumeirat was decided. 2 *N. S.* 541.

From this view of the case, it is readily seen, that there is no necessity to examine any other points made in the cause.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Preston, for the plaintiff.

Hoffman, for the defendant.

Berthoud *v.* Barbaroux. IV, N. S. 543.

Agreements are to be construed according to the intention of the parties.
Parol evidence may be given of the payment of a note of defendants, without producing it.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petitioner states, that at the request of the defendant and one Eugene Sheridan, he endorsed two notes of Sheridan for 1850 dollars each, which were delivered to a certain James Wood: that in consequence of this endorsement, they jointly covenanted with the petitioner that they would cause the money due on these notes to be paid to Wood or his assigns; that they would at all times save the petitioner harmless, in consequence of his endorsements; and, that they would constantly keep a certain steamboat, called the 'Superior, which they had conveyed to the petitioner, insured against all risks, or in default thereof, it might be lawful for him to insure her at their expense.

The petition avers, that neither Sheridan, nor the defendant has complied with his agreement; that the plaintiff has paid the insurance of the boat, and that they have neglected to pay the notes, although they are long since due; and that the petitioner has been called on to

pay the same. It concludes by praying an attachment against the property of Barbaroux, and judgment against him for the sum of 3853 dollars, 75 cents.

The answer of the defendant places the defence on several grounds.

1. That the plaintiff has paid nothing to Wood, and that the latter through negligence has lost recourse on the former.

2. That the petitioner took a mortgage on the steamboat Superior, and must exercise his right on it before he can have recourse on the defendant.

3. That by the laws of Kentucky, where the contract was entered into, the holders of the notes mentioned in the plaintiff's petition, cannot resort to the plaintiff and endorser, until they have prosecuted the maker, Sheridan, with due diligence, to insolvency.

4. That the plaintiff, and the assignees of the endorsee, Wood, are colluding together to cause the security the defendant has given, to inure to the benefit of the assignees of Wood.

5. That the plaintiff has now property in his hands belonging to Sheridan, the maker of the notes, and that this property must be discussed before judgment can be had against the defendant.

The plaintiff filed a supplemental petition, in which he stated, that at the commencement of the suit, he had paid one of the notes mentioned in the petition, and that since the institution of the action he had paid the other.

The defendant answered this new allegation, by denying the truth of it; and further, alleging that the plaintiff had received from the steamboat Superior on account of Sheridan, upwards of 2000 dollars, which more than pays the money advanced by him on account of insurance.

The court below gave judgment against the defendant for the sum paid by the plaintiff for insurance, and his commission thereon; but rejected the demand on account of the notes. The defendent appealed, and the plaintiff in this court has prayed, that the judgment should be amended, so as to embrace the whole amount claimed in the petition.

The first question is in respect to the correctness of that part of the judgment of which the plaintiff complains, and in this we are of opinion, the judge below has not erred. The words of the covenant are, that the defendant (and Sheridan) will cause "the said several sums of money due and payable by the said notes, to be paid to the said Wood or his assigns, according to the tenor and effect of the said notes, and that they will at all times save the said Berthoud harmless from all damages, costs and charges, which he may sustain in consequence of his endorsements made as aforesaid."

According to the laws of the country where this covenant was made, as in our own, covenants or agreements are to be construed according to the intention of the parties as collected from the whole context of the instrument, *ex antecedentibus et consequentibus.*

The whole of this contract, taken together, leaves no doubt on our minds, that the understanding of the parties was, that Berthoud should not have a right to call on the defendant and his co-obligor until he paid the notes. The nonpayment to Wood, could not give an action, unless the plaintiff was injured by it; and *non constat* that he was, for the holders of the notes may have failed to give him notice as endorser. To permit him to recover now, might be authorising him to recover a sum of money, which he may never be obliged to pay. See the case of Browning *v.* White, 2 Bosanquet and Puller, 13.

On the trial, a bill of exceptions was taken, which embraces the objections made: first, to a record offered in evidence on the part of the plaintiff: and secondly, to parol testimony, to establish the payment of the insurance.

The record was that of a suit of Barle & Maurin against Sheridan, owner of the steamboat Superior, for supplies and necessaries furnished to this boat, and was the best evidence that could have been offered to show a breach of that part of the covenant by which Sheridan and the defendant agreed, that they would pay all charges against said boat, in such a manner that no other liens should attach on her.

The objection taken to the evidence of the witness to prove payment, admits there was a note given, and presents the very same question as that decided in Spraggins *v.* White. It is impossible for us to say, that the production of the note would be better evidence than the testimony of the witness, for we are not informed that the insurance company gave a receipt on it; and the note itself, without the receipt, would not be evidence against the defendant. See 3 *N. S.* 663, and the authorities there cited.

On the merits, it is contended on the part of the defendant, that there is proof on the record that the plaintiff has been paid the amount advanced by him for the insurance of the boat. This proof is said to be contained in the record of the suit of Sheridan *v.* His Creditors, introduced by the plaintiff in evidence; which record contains the schedule of Sheridan's affairs, and makes no mention of his being indebted to Berthoud. We think too much weight is attempted to be given to this proof. It may have been omitted through error, or he may have made arrangements with the defendant to pay it: at all events, the presumption created by the silence of Sheridan, cannot be allowed to destroy the positive evidence furnished, of the existence of the debt, by the other proof adduced. It by no means follows, that, though the plaintiff should admit, Sheridan considered himself discharged, that therefore the defendant does not owe.

But, the point most relied on by the defendant, and which was most pressed on us by his counsel, was an alleged payment to the plaintiff arising out of the proceeds of the sale of the steamboat Superior. The facts, as they appear in evidence on this point are, that the boat was attached here at the suit of Barle & Maurin, for

sundries advanced her; that under the judgment rendered in that suit she was sold, and bought in by an agent of the plaintiffs, who re-sold her a few days after for an advance of 1300 dollars.

The defendant claims the benefit of this sale, on the evidence of the agent. But the whole of this evidence amounts to nothing more than a belief of the agent, that the plaintiff will allow the defendant the benefit of the advances made on the sale. He swears such was his intention in making the purchase, though he did not act under any particular instructions from the plaintiff; nor has he received any communication since the boat was re-sold, which will authorise him to say that Berthoud will allow this sum as a credit to defendant. The witness judges so from his general character; he does not believe the plaintiff had any other intention.

With the judge below, we are of opinion that no legal obligation arises out of this transaction which a court of justice can carry into effect. We set here to enforce legal, not moral obligations. Putting the case in the point of view most favorable to the defendant, namely, that the plaintiff was informed of the intention with which his agent bought, though of that there is no evidence, it amounts to nothing more than intention; and that intention may at any time be revoked, nor can any one claim the benefit of it. If indeed the defendant had suffered any injury, in consequence of the agent's purchasing with this declared object, another question might have arisen; but no such thing has been shown. On the contrary, the agent states he had no communication with any person except the plaintiff's attorney, and the person to whom he re-sold her. Under the principle by which the credit for this money is claimed; every thought of generosity or liberality, which passed through a man's mind, might be drawn from him by interrogatories, and converted into legal obligations.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Whittelsey, for the plaintiff.

Preston, for the defendant.

Fluker *v.* Turner. IV, N. S. 551.

An obligation to A, which B the obligor promises to settle with C, is not discharged by showing, in a suit by A against B, that C is indebted to the latter.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought on a promissory note made by the defendant to the plaintiff, which appears to contain double, or alternative stipulations. As the peculiarity of its expressions creates the whole difficulty in deciding the cause, it may not be improper to state them at length. They are as follows:

"Jackson, 17th October, 1821. I promise to pay David Fluker five hundred dollars, value received, on settlement of accounts; which I will settle with the representatives of Joseph Fletcher, deceased, at any time.

(Signed) J. TURNER."

The present suit was commenced on the 22d of April, 1825, and final judgment rendered in January, 1826, on a verdict in favor of the defendant, from which the plaintiff appealed.

The answer to the action contains two grounds of defence:

1. To the plaintiff's right to sue; which is denied by the defendant, alleging that the note, taken entire, contains no promise to the former, but is simply an undertaking to pay for him, to Fletcher's representatives, the amount specified, which the defendant states he has always been ready to do if required.

2. That he still is ready to settle with the representatives of Fletcher, who owe him more than the sum promised in said note, which is thereby compensated.

The instrument on which this suit is based, acknowledges a debt due from the defendant to the plaintiff, and contains a promise to pay the amount to the latter, by settling it with other persons, to whom he appears, from the evidence of the case, to have been at that time indebted. It contains two stipulations: first, to pay the sum therein mentioned to the promisee; secondly, to pay or settle the amount with Fletcher's representatives. The obligation arising out of the first of these stipulations might fairly have been dissolved by a fulfilment of the latter, and those to whom the promissor bound himself to settle, might, in a reasonable time, have legally claimed the benefit of the

stipulation made in their favor. They, however, seem never to have accepted or claimed the benefit of that stipulation; nor does it appear that the defendant did, in the course of nearly four years, ever attempt to make with them any settlement which would discharge the plaintiff from his obligation to pay to them, as their debtor, the sum specified in the promise of the former.

The question most difficult of solution in the cause is that created by the part of the answer which insists, that before any right of action accrues to the appellant, he ought to have required the appellee to comply with his promise, made in favor of the third persons; and that until such requisition on him he is not in delay, (*mora.*)

The promise being made in writing, and delivered to Fluker (probably out of the presence and not within the knowledge of Fletcher's representatives) for whose benefit it contained a stipulation, it is contended that until they have an opportunity afforded them of accepting or rejecting said stipulation, by being informed of its existence, the obligation to pay the plaintiff is dormant, and can only be awakened by a rejection of the benefit promised to the third persons.

We are, however, of opinion that the primary and substantial obligation is, to pay a debt acknowledged to be due to the appellant, and that the promise to settle with others is only a privilege granted to the promissor, as to the manner in which such payment might have been made. There is no expression in the instrument which seems to require that the defendant should have been quickened in his undertaking, to pay or settle with the representatives of Fletcher, by any request of the plaintiff to that effect. It is true the time within which he bound himself to make the settlement was left indefinite, but to give effect to the obligation, it ought to be limited to a reasonable time; and three and a half years were certainly abundant; which space elapsed between the period at which the note was made, and the inception of this suit.

The record is burthened with much irrelevant testimony, and as usual labors under many bills of exceptions, most of which we deem it unnecessary to examine, as the judge *a quo* seems to have admitted all the testimony offered on both sides, whether pertinent or impertinent; especially as the latter kind is such as could not possibly have had any influence on the decision of the cause. One only is thought worthy of notice, which relates to the competency of the witness M'Mikin; wherein we are of opinion that the district judge did not err.

The attempt of the defendant to discharge himself from the obligation to pay the plaintiff, by proof that the persons, with whom he agreed to settle, are indebted to him more than the amount which he promised to pay them, cannot legally succeed. If they had sued him on the promise made in their favor, a plea of compensation and proof of the debt pleaded, would have operated a discharge of his obligation to them, and consequently to the present plaintiff. But he cannot absolve himself from the obligation, arising out of his promise to the latter, by offering as a set-off debts which may be owing him

from persons who are yet parties to the present action. To admit such a defence would be to decide on rights without hearing the parties really interested in them; and if allowed, could not avail the plaintiff, after being defeated in this suit, in one instituted against him by these third persons as his creditors. A settlement and payment, in terms of the note, to the representatives of Fletcher, is the only thing which ought to exonerate the defendant from payment to Fletcher. If such he has made, it should have been proved on the trial of the cause in the court below. If it has not been made, Fletcher's representatives are liable to him for the amount, if they be really his debtors; and the plaintiff still remains their debtor to the same extent that he was when the note in question was made. There is no proof of such settlement and payment on the record, and consequently we are of opinion that the defence has failed, and that the plaintiff has made out his case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed; and it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the defendant and appellee 500 dollars, with legal interest from the judicial demand, and costs in both courts.

Destrehan *v.* Destrehan's Executors. IV, N. S. 557.

Grandchildren coming to the partition of their grandfather's estate, with uncles and aunts, are not obliged to collate an onerous obligation due by their father.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

The questions submitted to the court, to be decided in the present case, arise out of proceedings relating to an adjustment and partition of the succession of the late Jean Noel Destrehan: some are of fact and others of law. To understand them, it is necessary to state the situation of the parties to this suit, and that of their ancestor, from whom they claim to inherit. The widow G. N. Destrehan claims, as tutrix of her minor children now living, and as heir to those who died since the death of their father and grandfather, a part of the succession of the latter, which appears to have been administered, and was finally adjudged to his wife at the appraised value, as a

partner in the community, and who is since dead, leaving as heirs the same persons who succeeded as such to her husband's estate, with the exception of the present appellant, so far as she claims in her own right.

The evidence of the case shows, that G. N. Destrehan died before his father, leaving children, who were called to the inheritance of their grandfather, J. N. Destrehan, together with uncles and aunts, immediate descendants of the latter. The widow of G. N. Destrehan renounced the community of acquests and gains in her husband's estate, and, as tutrix of her minor children, accepted for them his succession, under the benefit of an inventory. The widow J. N. Destrehan, to whom had been adjudged the property which was held in common between her and her husband previous to his death, attempted to bequeath and distribute the amount of her husband's succession amongst his heirs, and for that purpose seems to have rendered her accounts to the judge of the court of probates: to these accounts opposition was made by the present appellant, which gives rise to the questions now before the court, the most important of which relates to the charges against the children of G. N. Destrehan, for advances made to the father during his lifetime, and which they are required to collate with the other heirs of their grandfather. The sums thus required to be collated, consist of several items: 1. A sum of 7000 dollars; 2. One of 9000 dollars; 3. A note executed by his son, G. N. Destrehan, to his father, for 58,564 dollars, payable on the first of April, 1826. The opposition extended also to other charges against the estate of her husband, by Mrs. Destrehan the elder, which, it was contended were properly chargeable to herself; but, as the correctness of the decision of the court below, in relation to these matters, is not introduced, we shall not notice them further than to express our concurrence, this far, in the judgment of the district court: that judgment is also correct in relation to the item of 7000 dollars, which does not appear to have been established by evidence. In relation to the 9000 dollars, we are also of opinion, that the decision of the district court is, in point of fact, as being proved by the oath of one credible witness, and corroborating circumstances, such as the will of the grandfather, and the evidence of advancements made by him to his daughters, &c.

The value of the slave, which was estimated at 1000 dollars, and died before the opening of the succession of J. N. Destrehan, was properly deducted as having perished for said succession; but the judgment of the district court having ordered the balance of this item, viz. 8000 dollars, together with a part of the amount of the note of 58,564 dollars, to be collated, the present appeal was taken by the opponents: and, it is now contended on their part, 1. That they are not legally bound to collate any thing advanced to their father; 2. That if they are compellable by law to collate, no part of the amount of the note of their father to the grandfather, ought to enter into such collation.

In support of the first position assumed by the counsel of the appellants he relies principally on the doctrine of the Spanish law, as laid down by *Febrero*, part 2, book 2, chap. 3, nos. 26 to 29. Admitting, that grandchildren who succeeded to the inheritance of their grandfather, conjointly with descendants in the first degree, and who had renounced the inheritance of their father on account of its being worth little or nothing, in consequence of waste and bad management by him, were not bound by the former laws of this country to collate advancements made to their father: we are decidedly of opinion, that this rule of inheritance has been changed by the introduction of the Civil Code. Without undertaking completely to reconcile the apparent discrepancy between the 19th article of page 148, and articles 27 and 28 in page 150 of the Code, it might be observed, that the first relates to the general doctrine on the subject of degrees of kindred and representation amongst relations in the decending line; whilst the two last are specific in their enactments, and lay down rules clear and special with regard to the manner in which descendants must succeed to the estates of their ascendants. Allowing that they are at variance, the latter may be considered as exceptions to the former: according to the rules of inheritance expressly declared in these last articles, grandchildren who partake of a succession together with children, come in by representation of their fathers and mothers, and take sure steps, &c.: if grandchildren come in by right of representation, they are bound to collate what had been given to their fathers or mothers, although they may have renounced their inheritances. Civil Code, p. 194, art. 203.

From this view of the subject, it appears to us, that a doubt cannot be reasonably entertained as to the liability of grandchildren to collate property received by their immediate parents as advancements made by their ascendants in the first degree.

The appellants in the present case, must be considered as inheriting from their grandfather by representation, and are therefore bound to bring back to the mass of his succession whatever sums of money or other property may have been advanced to their father during his lifetime, as donations to further his interest, and comfort in life, &c.: of this class of beneficent advances, is the sum of 8000 dollars, proved as above stated; but, as it relates to the item of 58,564 dollars, the amount of the note executed as before represented, this court has doubted much the propriety of the judgment of the court below, and finally come to the conclusion, that it is not supportable on legal principles. The decision of this question, the most difficult and important in the cause, depends on a just interpretation of the 205th and 206th articles of the Code, found at pages 195 and 196, which are expressed in the words following: "The advantages which a father bestows on his son, though in any other manner than by donation or legacy, are subject to collation." "Thus when a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, or has spent money to improve his son's

estate, all that is subject to collation." Art. 206. "The acts, however, of ascendants, which are beneficial to the descendants, are not all liable to collation. Those acts, by which the ascendant causes some part of his property to pass into the hands of his descendants by concealed and indirect means, are only liable to it: thus, there is no collation due, where a partnership was *bona fide* entered into between the ascendant and one of his lawful descendants, when the conditions of such partnership are duly proved."

"The same rule applies to all burthensome obligations, and to all mercantile transactions which the son executes with the father; none of which give place to collation, unless there has been on the part of the father an express or tacit intention of bestowing an advantage on his son; and thus, by that means, some part of the patrimony of one child is taken to increase the patrimony of the other." Before entering into any discussion on these articles, it may not be improper to remark, that the whole doctrine of collation is based principally on the equality which the law requires in the distribution of successions amongst coheirs.

The main foundation of the charge against the estate of G. N. Destrehan, in favor of that of his father, amounting to the large sum of 58,564 dollars, as evidenced by the promissory note of the former, seems, from the evidence of the case, to have been payments made by the latter, of the price of a plantation bought by his son. Had the affair been left in its original situation, the amount thus paid, would most clearly have been embraced by the provisions of the 205th article of the Code, as cited. But it does appear from an investigation of the whole transaction, that interest was added on interest, item to item, until the original sum was more than doubled; giving to the matter the appearance of a contract, completely onerous on the part of the obligor; and which certainly bears no intrinsic evidence of an intention on the part of the father of bestowing an advantage on his son, to increase his patrimony at the expense of that of his other children. It appears, from some evidence on the record, that Mr. Destrehan the elder, was in the habit of exacting ten per cent. per annum interest, on the sums by him advanced to his children, for the benefit of the younger members of his family, or those who remained under his paternal care and direction; and this mode of conduct is said to be sanctioned by reason and justice, and recognised as legal by principles found in the Roman law. If a parent gives to his child, who is about to take upon himself the management of his own affairs; in other words, who is about to commence the arduous task of providing for his own wants and those of a family, should he be thus connected in life, no more of his estate than a proportion equal to those retained for children who remain with him, it is difficult to discover any justice in burthening the child advanced with a heavy interest on the capital given. Ten per cent., per annum, we believe to be the full value of any capital used in the ordinary course of business. Is it then a donation to advance money at

that rate of interest; ought it not to be rather considered as an onerous loan? Parents are not generally in the habit of giving to their children, by way of advancement, more than a moderate proportion of their property compared with that which they retain for their own use, and the benefit of that part of their family which remains with them.

It is hardly necessary to state, that a child of full age may contract with his father, and create obligations equally binding as would be created by similar contracts with any other individual of the community. In the present case, G. N. Destrehan promised to pay to his father, a large sum of money, made up of advances for his benefit, and interest thereon, at least at the highest rate tolerated by law, if no more, which it is not necessary to decide in this case. In this promise we can see nothing but a contract of loan on interest in the usual form of such agreements. It is written, and certainly could have been enforced against the son, without his being at liberty to prove any thing contrary to the writing. If his estate were now solvent it could be effectually enforced against his representatives, and the administrators of his father's estate would be bound to see it fully collected, unless the heirs chose to relinquish it. The circumstance of the alleged insolvency of the estate of the son cannot, in our opinion, alter the nature of the contract, which is essentially commercial and burthensome on the part of the promissor and his succession.

In collating the 8000 dollars, we think, with the judge below, that it ought to be placed with the succession of the grandfather alone.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the cause be sent back to the court of probates, for the purpose of causing a final adjustment and partition of the succession of J. N. Destrehan, according to the principles expressed in this opinion and judgment, the appellees paying the costs of this appeal.

Seghers, for the plaintiff.

Derbigny, *Eustis* and *Grymes*, for the defendants.

Derbigny, *Eustis* and *Grymes*, on an application for a rehearing.

In this case a judgment has been rendered, which is considered as contrary to law, and evidence; and above all, against that equity which ought to be the principal guide in deciding a case of this nature.

Your honorable court has principally based their judgment on the circumstance, that the proof of the advances made by J. N. Destrehan to his son, appears in the shape of a note of hand, subscribed by the son in favor of the father, in which is included the interest, at the rate of ten per cent. per annum; and from thence they have concluded that this is one of those burthensome obligations, which form an exception to the general rule by which heirs are bound to return to the mass of the inheritance the sums by them received from their ancestor in his lifetime, the whole of which is to be distributed equally among them all.

[Destrehan v. Destrehan's Executors.]

But in the first place, and before recurring to the evidence which shows what has been the true nature of this transaction, your honorable court has evidently been mistaken in the interpretation of the article of our Code, which says, "that burthensome obligations and mercantile transactions which the son executes with his father, do not give him lieu to collation, unless there has been, on the part of the father, an express or tacit intention of bestowing an advantage on his son, and there is by that means some part of the patrimony of one child taken to increase the patrimony of the other." This paragraph of art. 206, p. 197 of our Code, is evidently intended to apply exclusively to the obligations contracted by the father towards the son; otherwise it would have no sense, for an obligation of the son towards the father can never conceal an intention on the part of the father to bestow an advantage on his son. If there could be a doubt that this is the only reasonable interpretation which can be given to this paragraph, it is done away by recurring to the principle established in the beginning of the article, of which this paragraph is but an illustration. "The acts however of the ascendant which are beneficial to his descendants are not at all liable to collation." "Thus there is no collation due where," &c.

If you will take the trouble of examining what would be the situation of things, if Guy N. Destrehan himself was alive, you may easily ascertain that no other interpretation can be given to the article above quoted. On the death of his father, he would have been at the same time one of the heirs, and one of the debtors of his estate. A compensation would have established itself between his share of the inheritance and his debt: whether a debtor or a donee, the same result would have taken place. Whether his father lent him or gave him in advance the money which he had received, he must have accounted for it. Not so, if his father had consented in his favor an onerous obligation; he would then have been a creditor of the estate, and unless it should have been shown that this onerous obligation concealed some advantage which his father intended to bestow on him, he would not have been obliged to collate it; he would first have received the amount of his claim as creditor, and then his share of the inheritance as heir; that is most evidently the sense, indeed the only sense which can be given to the article which says, "The acts however of the ascendant, which are beneficial to his descendants, are not all liable to collation;" for the acts by which the descendant acknowledges himself the debtor of his ascendant are not acts from which he can derive any benefit: they constitute him the debtor not the creditor of the estate.

The article referred to by the court is, therefore, not applicable to a case of this nature: and we must beg leave to say, respectfully, that they have misunderstood it.

That the doctrine here contended for is the only sound one, is made still more evident by recurring to the principle universally recognised with respect to collation.

[Destrehan v. Destrehan's Executors.]

The article 192, page 192, of our Code, says, "Collation of goods is the supposed or real return which an heir makes to the mass, of some property, which he *received* in advancement or otherwise, in order that such property may be partaken as well as the other effects of the succession." There is no doubt, then, that Guy N. Destrehan would have been obliged to collate to the mass of his father's estate, what he had *received* in advancement or otherwise. Are those who come to the estate as his representatives, differently situated? Hear what Pothier says on the subject: "Lorsque des petits enfans viennent à la succession de leur ayeul *par représentation* de leur père ou mère, ils doivent rapporter tout ce qui a été donné *ou prêté* à leur père ou mère par l'ayeul à la succession duquel ils viennent. La raison en est bien évidente; des représentans *ne peuvent avoir plus de droits dans une succession que la personne qu'ils représentent*, et du chef de laquelle ils viennent, suivant ce principe de droit, "*qui jure alterius utitur, eodem jure uti debet*," ils ne doivent pas plus prendre dans la succession que cette personne y aurait pris; ils doivent être obligés *aux mêmes rapports* auxquels cette personne aurait été obligée.

"Cette décision a lieu, quand même ils n'auraient pas profité de ce qui a été donné à leur père ou mère qu'ils représentent, et qu'ils auraient renoncé à la succession; car, comme ce n'est pas de leur chef qu'ils doivent ce rapport, mais du chef de leur père ou mère qu'ils représentent, il est indifférent qu'ils en ayent profité ou non.

"Cette décision a lieu, quand même ces rapports absorberaient toute leur portion héréditaire, et qu'il ne leur resterait plus rien. Ils ne pourraient prétendre en ce cas de légitime; *car, n'ayant droit à la succession de leur ayeul, que du chef de leur père ou mère qu'ils représentent, ils ne peuvent aussi prétendre dans cette succession d'autre légitime que celle, qu'auraient pu prétendre leur père ou mère;* et par conséquent, ces donations leur doivent être imputées sur cette légitime comme elles auraient été imputées à leur père ou mère."

Observe, that the above is but the expounding of the principle contained in our own Code, page 149, article 18. "Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the represented."

These fundamental principles, to be found in every book which has treated the subject, would, it was presumed, have been the rule of conduct of your honorable court, in the decision of this case. It was thought that you would recognise, that the representatives have no more right than the represented, that *qui jure alterius utitur, eodem jure uti debet.* But these principles were not so much as hinted at, in the judgment of this honorable court, because they have taken the most extraordinary position, that the loan was not subject to collation by Guy N. Destrehan himself; and thus it turns out, that although Guy N. Destrehan, if alive, would have had to account to the estate of his father for this loan, although this loan would have

been deducted from his hereditary portion, although he would have had to compensate his debt with his inheritance, although confusion would have taken place in him as, at once, debtor and heir; yet his representatives are discharged from his obligations, and admitted as heirs *in his stead*, without accounting for what he has received; and that, notwithstanding the rule which says, *qui jure alterius utitur, eodem jure uti debet.*

From such a result it may respectfully be inferred, that this honorable court has misunderstood the meaning of the article on which they have based their decision; for that decision is at war with the principles on which representation is founded.

But this honorable court have, we think, not only mistaken the law, they have misapprehended the evidence in this important case. What is that evidence? Why, that J. N. Destrehan has *advanced* to his son a sum of 40,000 dollars, (the adverse party avows 37,000.) If you look at the memorandum or account, found among the son's papers, and the production of which we compelled, you find the explication of the note of 58,564 dollars, 40,000 dollars, of which (say 37,000 dollars, if you please) are the capital advanced; the balance is made up of the interest which J. N. Destrehan used to charge on such occasions, not for himself but for the benefit of his minor children.

N. B. Le Breton tells you: "That Mr. J. N. Destrehan advanced some money to his son Mr. Guy N. Destrehan, and gave him up the several notes which he held; (the notes of Guy N. Destrehan to Henderson, for the price of the plantation;) and it was on this occasion that Mr. Guy N. Destrehan gave to his father a promissory note of 58,000 dollars, which witness *understood from him* to be on account of the different advances which his father had made him; that in speaking of the sums he owed his father, Mr. Guy N. Destrehan spoke of them—as of sums which he should never be called upon to repay, and stated that it appeared to be his father's intention to make these advances to him part of the share which might be coming to him out of his father's estate.

Mr. Hermann tells you: "He knows, from Mr. J. N. Destrehan and from Mr. G. N. Destrehan his son, that the latter had received from his father a sum of 40,000 dollars; that Mr. Destrehan, the father, manifested some reluctance in making the above advance of 40,000 dollars to his son G. N. Destrehan, and observed, that he did so on account of the plantation then purchased by his son." He speaks also of the interest he used to charge for the benefit of his minor children. All the witnesses state, that Guy N. Destrehan had little or nothing but what he derived from his father.

The facts, then, as they result from the evidence, are these: Guy N. Destrehan, the son, being in strait circumstances, applied to his father for assistance; his father advanced to him 40,000 dollars, but at the same time stipulated that this sum should bear an interest in favor of his minor children: it was understood, however, between

father and son that this money never should be repaid, except out of the share which would one day come to G. N. Destrehan in his father's estate. The 40,000 dollars are composed of the notes of G. N. Destrehan to Henderson, for the price of the plantation, and the balance in cash: Destrehan the father, surrendered to his son those notes, which bore Henderson's endorsements, and were secured by mortgage, and took from his son his simple recognisance in the form of a note of hand to his own order.

Surely if these facts had been well understood the court would not have arrived at a conclusion which discharges G. N. Destrehan's representatives from accounting for this money. Was it an onerous obligation for the son to receive 40,000 dollars? Did he receive them at all? If he did receive them, must they not be accounted for? Has the circumstance of Destrehan, the father, charging interest altered the stubborn fact, that he advanced to his son 40,000 dollars? The interest, it is said, was an unjust charge: take it away, if you think that equity requires so; but because interest has been charged, to destroy the capital cannot be justice, cannot be law.

The court seems to have mistaken the evidence still further: they say that the capital has been more than doubled by the interest: if it were even so, still that is no reason why the capital should not be accounted for: but it is not so. The adverse party herself admits that the capital advanced was 37,000 dollars; our evidence shows 40,000 dollars. The note is 58,564 dollars; is then 18,564 dollars more than one half of 58,564 dollars? This is adduced to show more and more that the court has been in an error throughout this case: and when we consider that it was argued nearly two months before it was decided, and that in this interval of time the members of this court have been absent in succession, so as to render it probable that they had no opportunity of examining this case together while it was fresh in their memories, it is not to be wondered at, that the evidence adduced, and even the laws quoted on the trial should have been but imperfectly understood.

The plaintiffs, therefore, respectfully pray, that this case may be revised and argued *de novo*. They pray so, from a conviction that if this honorable court will find that justice has not been done, they will retrace their steps, and show, that if they may err as other men, they are willing to correct their errors while it is yet in their power.

The rehearing was granted; and after the argument,

PORTER, J., delivered the opinion of the court.

The children of Guy N. Destrehan, deceased, who have accepted their father's succession, with the benefit of an inventory, claim the portion in their grandfather's estate to which their father, if alive, would have been entitled. Their uncles and aunts, with whom the partition is to be made, insist, that they must bring back into the succession and collate, various sums of money received by Guy N.

Destrehan in his lifetime; and among others, the sum which is evidenced by his note in favor of his father, for 58,564 dollars, payable four years after date. This collation the grandchildren insist they are not obliged to make, and the legal rights of the parties on this issue, form the principal question to be decided in the cause, and the only one which presents any difficulty in the decision.

After the first argument, we were of opinion that the grandchildren were not obliged to collate the note on which this contest has arisen. That opinion was principally founded on the article of our former Code, which declares that "burthensome obligations and mercantile transactions, which the son executes with his father are not subject to collation, unless there has been, on the part of the father, an express or tacit intention of bestowing an advantage on his son." The words of the law certainly authorised this construction; and the reason, on which the whole of the doctrine in regard to collation rests, gave it support. It might well be supposed to have been the intention of the lawmaker, that the son who received any thing in advance of his future claims as heir should collate; but, that if he entered into contracts with his father, as with a third person, they should be considered as ordinary obligations, to be discharged in the usual way, with all the burthens attached to them; and that he could not be permitted after so contracting, to free himself from these burthens, release himself from the interest, and collate with his coheirs, the principal alone. The objection urged against this construction, that in no case of the obligation from the son to the father, can there be a tacit, or express intention, of bestowing an advantage on the son, appears to us of little weight; many instances might be supposed, in which that intention might be expressed by the note; many more where it would be implied. We shall take one by way of example, and it will suffice: if the father lends the son a large sum of money, without interest, and takes his note, payable at a remote period of time, for the principal, there is a clear intention evidenced of bestowing an advantage on him; and the coheirs would assuredly have a right to demand that the sum of money so obtained should be brought back into the mass and collated. Civil Code, 196, art. 206.

But on the second argument, another provision in our law has been discovered, which has an important effect on the construction of the article just commented on. It is that which declares, that on the partition of an estate each of the co-parceners must collate conformable to the rules hereafter prescribed; for gifts made to him, or *debts by him due*. This provision is directly opposed to the construction contended for, of the 206th article. It makes debts expressly subject to collation, and does not distinguish of what kind, whether those that carry interest, or those that do not. Under such circumstances it is our duty to seek for a construction that will prevent these two provisions from clashing with each other. We must, as we have often done before, interpret in such a way, as will if possible, give every part of the law effect. Civil Code, 188, art. 178.

To do so is not an easy task. The counsel have contended that the expressions "burthensome obligations and mercantile transactions which the son executes with the father," mean burthensome obligations which the father executes to his son. Such an interpretation does considerable violence to the language used in the law; for a man who receives a note from another, can hardly be said to execute the note with the person, who is bound to him. But there is a stronger argument against this interpetration to be drawn from the previous and immediately preceding articles, to that which in these words are found. By them all kinds of feigned or simulated obligations from the father to the son are expressly provided for. It cannot he believed then, it was the intention of the lawmaker to provide, by ambiguous and doubtful terms, for cases on which he had the instant before expressed himself in clear and explicit language. Civil Code, 194, art. 205.

But it is not necessary to give any opinion on this point, for it is not requisite to a decision of the case before us. Perhaps when it is presented in such a way as it must be settled, it will be found that those obligations which in pursuance of the words of the law, the son executes with the father; that is, jointly with him, are these which are contemplated by this enactment. The clause immediately follows the provision in relation to partnerships; and it is more than probable that, while the subject of contracts, in which the father and son act together, were under the consideration of the legislature, it was thought necessary to provide for those in which they might have a joint interest, as well as those in which there was a partnership. It is not to be disguised, that this interpretation is liable to objections, but we think it presents fewer than that contended for by the appellees. The plain meaning of the words used, was, that which we at first gave to them: obliged to abandon our first impressions, in order to make the law consistent throughout, we can only take that which presents the least difficulty, for it is impossible to come to clear conclusions on such obscure legislation.

We have conducted the inquiry so far in relation to the rights of the father of the grandchildren. If he were presenting himself with his brothers and sisters, it is the opinion of the court that he would be obliged to collate the debt, which the note produced in evidence, shows to have been due by him.

This opinion brings us to the second, and equally important question in the cause; that is, whether the grandchildren are obliged to collate the debt due by their father, whose succession they have accepted with the benefit of an inventory.

The affirmative of this position has been supported, on the general principle that the representative never can have more or greater rights than the represented; that positive texts of our law have established this doctrine in regard to grandchildren; and that if the law were even doubtful, the court should prefer the interpretation, which, by establishing equality between the heirs, would do justice.

[Destrehan v. Destrehan's Executors.]

The proposition, that the representative never can have more rights than the represented, struck us, on the argument, as entitled to great weight, and as almost conclusive on the case; further reflection, however, has convinced us that it must be admitted with many modifications: taken abstractedly it cannot be controverted; for, independent of positive legislation, a man cannot give to another, rights which he does not possess. But where the representation is created by positive authority, it is subject to all the modifications which the creator may choose to attach to it: thus, in relation to our political representatives, it is well known they have rights conferred on them which their constituents do not possess either individually or collectively: the right not to be questioned for any speech, or debate; the privilege from arrest, &c. So in respect to the representation which is created by law, for dividing estates among individuals; if it should be found, on further examination, that it has been established with limitations to the general principle, we are satisfied that the general principle, cannot prevent these limitations from having effect.

But it is said the positive provisions of our law on the subject, now under consideration, supports the general principle relied on. The first article quoted, is that in relation to the manner in which children are called to the succession of their grandfather, where their uncles and aunts are alive; and it states, that the grandchildren coming in by way of representation, whatever may be the number, shall not receive among them all, any thing more, than the share, or shares, which would have belonged to their fathers and mothers. This law follows that which declares, that where all the sons and daughters are dead, the children shall take by heads; and is providing for the number of shares into which the estate shall be divided, in case some of the former are alive. It is of importance then, in the present inquiry, only as establishing that children coming to the partition of a succession under the circumstances which this case presents, come in by representation. Civil Code, 150, art. 29.

"Representation is a fiction of the law, the effect of which is to put the representative in the place, degree, and rights of the represented." Civil Code, 148, art. 18.

This provision, if taken alone, certainly goes the whole length for which the appellees contended. Before noticing, however, the important limitation which the legislator has thought proper to affix to it, in relation to the subject under consideration, it is necessary to a true construction of the article in which that limitation is found, to bring into view some of the other provisions of the Code, on the same matter.

"One can represent a person, to the succession of whom he has renounced. Thus it is not necessary that the children who succeed by representation should be heirs of their father and mother. Although they should have renounced their succession, they are nevertheless fit to represent them in the succession of their grandfather, or other ascendants." Civil Code, 148, art. 25.

Now, here is a provision which cannot be reconciled with the effect, which it is contended should be given to the general rule already cited. According to that rule, the representative shall have the same rights as the represented. This provides, that the child who has renounced his father's succession may still represent him in that of the grandfather. It is a formal provision of our law, that children who have renounced, or accepted, with the benefit of an inventory, are not responsible for the debts of their ancestor; then if they can represent their father, although they have renounced his estate, they stand in a different situation from him; for he would have to pay any debt he might owe to his father, or others.

The next succeeding article to that just quoted, shows still more clearly, what is meant by representation, and with what limitation it must be understood. "When a person has been disinherited by his father or mother, or excluded by cause of unworthiness, his children cannot represent him, in the succession of their grandfather or other ascendants, if he is alive at the time of opening the succession; but they can represent him, if deceased before. Civil Code, 148, art. 26.

From this provision it follows, that the representative may have more rights than the represented. The child, if alive could take nothing: the child represents him, and yet takes the share in the grandfather's estate, which the father could not have taken.

Acting on the same principle, that the representation of the father is a mere fiction of the law, the legislator has affixed a most important limit to it, in relation to the obligation of the grandchildren to collate. The provision in our Code is in these words: "In like manner the grandchild, when inheriting in his own name from the grandfather or grandmother, is not obliged to refund the gifts made to his father, even though he should have accepted his succession; but if the grandchild comes in only by right of representation, he must collate what has been given to his father, even though he should have renounced his succession. Civil Code, 194, art. 203.

The difference of the obligation between the father and his son, in regard to the collation in the grandfather's estate, cannot be more strikingly shown than by quoting again from the Code the provision in respect to the father, and placing it in opposition to that, which imposes this burthen on the grandchild. When the former partakes, "the mass must include the collations which each co-parcener may have to collate, conformable to the rules hereafter prescribed, for gifts so made to him, or debts by him due." But the latter are only obliged to bring in what has been given to their ancestor. Now if gifts included debts, why the use of the latter word in speaking of the obligations of the father? If it did not, why confine the obligation of the grandchildren to what had been given? The only answer we can conceive to this inquiry is, that the legislature intended to make a difference. That they have done so, no one who compares the phraseology of the two provisions, can for one moment hesitate to admit.

These positive provisions of our law, and the reasoning just used on them, furnish, we believe, a complete answer to the maxim so much pressed on us in the argument, *qui jure alterius utitur, eodem jure uti debet.* To this rule, to which it was said there was no exception, we have seen there are many. The error of giving it so much importance, proceeds, from confounding representation, with transmission. The latter arises from a right vested in one person being transferred to another. In such case, he who receives it can have no other, or greater rights, than the person from whom it has passed. As, if the father should die after the succession was opened, and his children came forwards to represent him in the partition of their grandfather's estate; in such case they could take neither more, nor less, than he did. But when the father dies before the grandfather, the grandchildren do not take their right from their father; they receive it from the law, independent of his acts or his will; and even when he should have manifested a contrary intention. This distinction, which is obvious enough, does not originate with this court; it is taken from the jurists and tribunals of France, who have commented on those articles of the Napoleon Code, from which ours are copies: and they deduce from it the necessary consequence, that the grandchild, when he comes in by representation, is not obliged to pay the debts of his father. *Manuel de Droit Français*, art. 744, in note; *Journal des Audiences*, 177; *Toullier, Droit Civil Français*, vol. 4, *lib.* 3, *tit.* 1, *cap.* 3, *nos.* 186, 187; *Delvincourt, Cours de Code Civil, Notes et Explications*, 28; *Paillet, Legislation et Jurisprudence des Successions*, vol. 2, 600.

The author last cited, in laying down the principle, that the grandchild, when he takes by representation, is not responsible for the debts due by the father, suggests a doubt whether the rule applies to those due by the latter to the grandfather, and refers to the observations of Merlin on that point. We have followed the reference, and perused it with attention; as we have also a work not cited in argument, *Chabot on Successions*, in which the same doctrine is found. Both these writers state, that the grandchild is obliged to collate, the gifts made to the father, and the money lent to him. *Répertoire de Jurisprudence*, vol. 10, *p.* 686; *Chabot sur la loi des Successions*, (ed. 1818,) vol. 3, *p.* 366.

We are unable to see on what grounds this doctrine rests, or how a law which says, that the grandchild shall collate gifts made to the father, can be extended to debts due by him for the loan of money on interest; or any other onerous contract in which the pecuniary interests of the grandfather formed the leading motive of the contract, instead of the advancement of his child; or why the children of the grandfather should be preferred in virtue of such obligations, to any other creditor. If by the expressions used by Merlin, *un simple prêt d'argent*, be meant, a loan of money without interest, the doctrine is intelligible enough; for, the advancement of the father must be presumed the ruling motive. Other writers confine the obligation

of the grandchildren to what has been given. *Toullier, Droit Civil Français, vol.* 4, *liv.* 3, *tit.* 1, *cap.* 6, *no.* 459; *Delvincourt, Cours da Code Civil, vol.* 3, *note to p.* 38.

The reasons adduced for establishing this doctrine is, that the representative can not have more rights than the represented. We have already expressed ourselves fully on this point; but, if this be the ground on which the obligation of the grandchild to collate money lent his father on interest be placed, then we are unable to perceive why the obligation should stop there, or on what solid grounds, debts due for property sold to the father, or on any other onerous contract, should be excluded; yet, not a writer whom we have been able to consult, carries the obligation thus far. To this doctrine, therefore, we cannot assent, opposed as it is, to what we believe the language and the spirit of the law, and to show more clearly the soundness of the construction we have adopted, and place the whole merits of this part of the subject at once before the minds of others, we shall bring together the several enactments, and close our observations on their legal construction, by reference to a general principle, the truth of which we have never heard contested.

The first provision in the Code which furnishes the general principle, declares, that the representative shall have the same rights as the represented.

The second provides, in relation to this particular subject, that the represented (the father) shall collate the debts due by him.

The third declares, that the representative (the grandchild) shall collate the gifts made (to the father) the represented.

The question then is, whether the limitation here affixed to the general principle, is to control it. Now, there is no rule better known, and we may add, more frequently acted on in the interpretation of statutes, than this: that general provisions are controlled, by special enactments which follow them. They are always understood to be exceptions, which the lawmaker establishes to the general principle

And why should this exception not be made? and is not the limitation which the legislature has thought proper to affix to the rule, wise, just and politic? are questions which this court has frequently asked itself in the examination of this subject. The object of the law is, to prevent one child from profiting by parental affection, at the expense of the other. But when the object of the contract has not been the gratification of this ill regulated feeling on the part of the parent, but to benefit himself, and promote his pecuniary interests; whether that object be ascertained from selling to the child property at a high price, or lending him money at the heaviest rate of interest which the law will allow; he ought not, nor his heirs ought not, to stand in a better situation than other creditors. Where gain is the motive the risk of loss should be the consequence. Nor can it be excluded from the consideration of this part of the subject, that the influence of parental authority, and the confidence which flows from filial affection, may induce the child to enter into contracts with the

father, which would not be made with other persons, and that the law is both benevolent and wise, in refusing to such agreements any preference over others.

But it is said this construction violates every principle of equity. If by equity be meant giving to each child, and the representatives of each child, exactly the same sum out of the grandfather's estate, then this opinion does violate that equity. But abstractedly considered, we apprehend there are few who will admit this proposition: this court cannot. The equity, independent of positive regulation, we should rather think depends on the particular circumstances of each case. If the grandchildren, to the claims of orphanship and infancy, add those of poverty; and are opposed to wealth, and age, the equity would be the other way. But those matters depend entirely on positive law, and the opinion we have enounced, *can only be inequitable in as much as it is contrary to law.* When all the parents are dead, the grandchildren, by a positive provision of our Code, take alike, no matter what sum their fathers or mothers may have received. By the former jurisprudence of this country, grandchildren were not obliged to collate even the gifts made to their parent, unless the object given, descended to them and they profited by it. The equity, therefore, relied on, receives as little sanction from our ancient and present legislation, as it does from the common feelings of mankind. Civil Code, 194, art. 203; *Febrero, p.* 1, *cap,* 1, *sect.* 7, *no.* 117.

The real question in the cause is, was the money given in advancement of the son's claims in the succession of the grandfather? If it was, then the grandchild should collate it. If on the contrary, it was a contract by which the parties became creditor and debtor in the common acceptation of the terms, then it must stand on the same footing as ordinary claims arising out of agreements entered into with strangers. The appellees, aware of this, produced parol evidence in the court of the first instance, to take the transaction out of the ordinary course of business, as evidenced by the obligation. Before, however, noticing that evidence, it is proper to set out the note itself. The following is a translation of it:

$58,564. NEW ORLEANS, 30 April, 1822.

On the first day of April, 1826, I promise to pay to the order of Mr. Jean Noel Destrehan, at the domicil of Mr. David Oliver, the sum of fifty-eight thousand five hundred and sixty-four dollars, value received.

(Signed) G. N. DESTREHAN.

Of this sum, according to the grandchildren, 21,000 dollars was composed of interest, but the appellees insist that only 18,564 dollars of the whole amount was formed in this way. It is immaterial which we adopt, in seeking for the character of the transaction.

Scarcely any agreement which could be produced in a court of

justice, would less evidence an intention of a father bestowing a benefit, or conferring an advantage on his child. The note is made negotiable, and a domicil different from that of the drawer, given to facilitate this object. The heaviest rate of interest which the law will permit is charged; and a certain day fixed for the payment, at the expiration of which it could be enforced. We are at loss to imagine what other features could have belonged to the contract, if the son had borrowed from a total stranger. The term of credit given, shows almost conclusively, that the son was not to pay out of his claims on the father's estate. The heavy rate of interest repels the idea, that any advantage was to be conferred.

Nothing in the parol evidence destroys the strong conviction produced by these facts.

The first witness says, he understood from the son that the note was given for different advances which the father had made to him, and that the son in speaking of them, spoke of them as sums which he would never be called on to repay, and stated that it appeared to be his father's intention to make the advances part of the share which might be coming to him out of his father's estate.

That such was the son's hope we believe; but the contract shows that it depended entirely on the father's pleasure, whether that hope should be realised or not. The witness does not state the money was lent on these terms. The note contradicts any such idea. The son did not say the father had given him the money in advance of what he might except as heir. He only stated that it *appeared* to be his *intention* to consider it such.

This evidence does not take the case out of an ordinary loan of interest.

That in relation to the expressions used by the father, is still weaker. There is no acknowledgment by him, that the money was given to his son, nor any thing like it, unless one should consider such the statement, of the witness, that Mr. Destrehan the father, manifested some reluctance in making the advance of 40,000 dollars, to his son G. N. Destrehan, and observed "that he did so on account of the plantation then purchased by his son." But these expressions are too equivocal, to destroy the plain import of the instrument. An engagement, to pay at a certain time with interest, is better evidence of what the parties meant, than that furnished by conversations of this kind.

The strongest argument, in favor of the father's intention to consider this as money given to the heir, is the entrusting him so large a sum of money without security. And we do believe that it may have entered into the consideration of the former, that if the money was not repaid the son would be obliged to collate it out of his claims on the succession. But it is clear that he did not look to that alone, that he reserved to himself the right of enforcing his demand, whenever the credit which he gave should expire.

We therefore conclude that the money, which formed the conside-

ration of this note, was not a gift from the father to the son; and that, as the law confines the obligaton of the grandchildren, to bring into collation that which was given to their father, the court below erred in compelling the appellants to deduct it out of their share in J. N. Destrehan's estate.

In the examination of this case a difficulty occurred to us, in relation to the manner in which the minor heirs have entered into the succession of their father. We have doubted whether an absolute renunciation was not necessary, instead of an acceptance with the benefit of an inventory. It is stated affirmatively by several of the writers, that grandchildren taking the property in the grandfather's estate, are not responsible for the debts of the father, when they renounce the succession of the latter. Their rights, when they accept with the benefit of an inventory, do not seem to have been noticed. After much reflection we are unable to distinguish the one case from the other. The beneficiary heir is regarded merely as the administrator of the estate. And he is responsible no further than for the amount of the property belonging to the father, which comes into his hands. Now that which the grandchild takes in the grandfather's estate is not the property of the father, for the latter died before the succession was opened, consequently nothing was vested in him, which he could transmit to the son.

This case, as it will be seen, is one in which there is much difficulty, and we have felt considerable doubts in regard to the true construction of the articles in our Code on which this contest has arisen. That which we have given, we believe to be freer from objections, than any other which can be adopted, and on the whole we do not think that the former judgment of the court requires any alteration.

Ludeling *v.* His Creditors. IV, N. S. 601.

By the Spanish law opposition to a tableau of distribution in a case of bankruptcy must be made in writing.

The nature of the Spanish action *juicio de concurso* considered.

FOURTH District.

PORTER, J., delivered the opinion of the court.

This case is presented on an assignment of errors.

[Ludeling v. His Creditors.]

The syndics of the insolvent filed the tableau of distribution, and gave public notice in writing to the creditors of the estate, to show cause, on the second day of the term of the court ensuing, that at which the order was granted, why the said tableau should not be confirmed.

No opposition in writing was filed, at the time mentioned in the notice; but the case being called on a subsequent day, several of the creditors appeared and objected orally to the correctness of the tableau. Their right to do so was contested, but the court received their opposition and the proofs offered, and gave judgment, by which the amount to be paid some creditors, and the order and rank in which others should be paid, were different from that given in the tableau of distribution.

The legality of that proceeding has been contested before us, and we think there cannot be a doubt of its irregularity.

If the question were to be decided by the particular provisions of our law, on the subject of surrenders, it would be too plain for argument. The act of 1817 requires, that after the tableau of distribution has been placed in court by the syndics, any creditors who object to it, shall file their opposition in the clerk's office. A compliance with this provision necesarily requires, the opposition should be made in writing. Acts of 1817, p. 142, sect. 136, 137.

But it is contended, these proceedings commenced by an application for a forced surrender; that by the rules of the Spanish law, this opposition might be made orally. If these rules were found to contain any thing different from our present regulations on this point, it might be made a question, and a serious one too, whether the repeal of the law, giving that remedy previous to the final homologation of the proceedings, did not deprive the court of the power to pursue any longer the forms which it prescribes. It might perhaps be urged, that as the legislature have the complete control over remedies, no right can be vested in any one to use them longer than they are permitted to remain in force, and that the circumstance of proceedings being commenced under them, cannot enable the party to continue to act under their authority, after they have ceased to exist. Our understanding, however, of the ancient laws of the country, precludes the necessity of examining this question.

Before we go into the consideration of the mode, in which the pleadings in a cause were permitted in the Spanish courts, and the *contestatio litis* formed, it is proper to consider the nature of the action in which this contest has arisen, and the situation of the parties to it. It is that known to the laws of Spain by the appellation of *juicio de concurso*, and it differs from every other in this important particular, that all the parties to it, except the insolvent, are at once plaintiffs, and defendants. Each creditor is plaintiff against the failing debtor, to recover the amount due by him, and against the co-creditors to diminish the amount they demand from the estate; and each is of necessity defendant, against the opposition made by the other credit-

ors against his demand. From the peculiar situation, in which the parties are thus placed, many distinct and separate suits arise, and are decided during the pendency of the main one by the insolvent, in which they originate. But this peculiarity in the mode of litigating the matters in dispute between those persons to whom the bankrupt is indebted, works no change in the necessity of the proceedings being conducted in conformity with those fundamental principles which govern all suits tried in a court of justice. In every separate judgment which may be pronounced, there must be both *actor et reus;* the *contestatio litis* must be formed; and the parties, unless they make default, must be heard. These are essential requisites to every judgment, in every country, and in every case: without them, no decree can be validly pronounced, and which would not, if these facts were disclosed, on the face of it, import nullity.

If we leave this ground, which is not only supported by positive law, but has its origin in the nature of things, and the first principles of justice, and look into the expediency of the rule in relation to causes such as that before us, no case can be imagined which calls more emphatically for a strict observance of it. Each of the creditors finds himself thrown into court with, most frequently, a number of other persons, all in pursuit of the same object as himself. He knows that he must prove in the first instance his claim against the insolvent's estate, and he comes prepared to do so. This proof once made, is so generally acquiesced in, that it is rare the party making it prepares himself to prove his debt again, unless warned to do so, by the opposition filed by some other creditor. No case, then, can be imagined where is greater necessity that he should be informed by the pleadings, of the necessity of producing his proofs. It is essential to guard against surprise, and to prevent confusion among so many litigants.

From these considerations, we are perfectly clear, the *litis contestatio* must be formed among the creditors, before the court can pronounce judgment on the force of their respective claims, as against each other. It only remains to inquire, if it was formed in this case.

The appellees contend it was, because the creditors who considered themselves aggrieved by the tableau, made opposition orally in open court to the homologation; but to this position we can by no means assent. Leaving out of view the knowledge we have of the practice in the Spanish courts, from those proceedings which have passed under our examination, where not only the pleadings, but the proof was reduced to writing, and every thing done or said put on the record with a painful minuteness, we have only to recur to the statutes of that country to be satisfied how unsupported they leave the proceedings which took place here. By the laws of the *Partidas*, pleadings in court were directed to be in writing, even in the illiterate state of society, existing when that work was promulgated. *Partida* 3, *tit.* 2, *law* 41. A subsequent law of the *Recopilacion* permitted them to be made verbally; but Febrero tells us it was not in use, and that pleadings must be in writing, according to another provision

found in the same work. *Febrero, p. 2, lib. 3, cap. 1, sect. 2, no. 30.*

But were we even to admit that suits could have been carried on, and issue joined by oral allegations, in the Spanish courts, the proceedings in this case would still be irregular. The laws establishing the practice in our tribunals, require the petition and answer to be in writing, and it has not even been pretended since the establishment of our government in Louisiana, that actions could be commenced, or conducted, in any other way but by written allegations.

We have already seen, that on general principles, this case formed no exception to the ordinary rules. An examination of the authors who treat professedly of this judgment, leads us to the same result. Febrero, after observing that all the parties to the *concurso* are plaintiffs, and defendants, states, that copies of what each allege or pretend, should be given to the opposite party; and, that if their papers are returned without answer, he who returns them shall be considered in default, and proceedings shall then be had as in an ordinary suit. *Febrero, lib. 3, cap. 3, sect. 1, no. 29.*

The same author tells us, that the sentence of gradation, or in our legal phraseology, the decree which settles the rank and order in which each creditor should be paid, does not affect the rights of those who were not cited, and ignorant of the proceedings; but if those who were cited consent expressly, or remain silent, the decision has the authority of the thing judged. This is almost the case before us, and it is precisely that of which the appellants complain; that although no opposition was made against the tableau, (for a verbal opposition is the same as none,) the court went into an examination of the case on the merits, and did not give to the tableau, as filed, the authority of *res judicata.* It is somewhat difficult to ascertain from the Spanish books of practice, whether the sentence of gradation, *sentencia de graduacion*, was made on a tableau filed by the syndics, or settled in the first instance by the judge, after calling the parties before him. We incline to think the latter was the ordinary mode. But whether it was or not, the principle on which the affirmation of the decree was made, namely, want of opposition, is the same. It makes no difference whether the judge tells the creditor, you shall be paid according to the order and rank which I have given you, and if you do not make opposition or show cause against this decree it will become final, or the syndics calling on the creditors to show cause why the gradation which they have given to each of them shall not be confirmed, and become the judgment of the court. The consent which is inferred from their silence is as strong in one case as the other, and the consequences must, in onr opinion, be the same.

The respect which this court feels for that first principle of justice, that no man should be condemned unheard, unless he chooses to be so, by refusing or neglecting the right which the law gives him, calls, in the instance before us, for a reversal of the judgment of the inferior court. The syndics filed a tableau of distribution, and gave notice to

all the creditors who were not satisfied with the classification there made of their claims, to appear on or before a particular time and oppose it. This opposition was not made in writing, nor even verbally until the moment the tableau was called up for homologation. Those who were satisfied with the amount given and rank assigned them, had no occasion, nor could they have conceived it necessary to be ready to support their pretensions, as they were not informed by the pleadings that their claims were contested, A judgment then which passed on these claims, to their prejudice, is well assigned as error, if pronounced without issue joined, and decided on the rights of parties who were not in default, without hearing them. In any case this would be bad; it is more particularly so after the presumption raised by the tableau, acknowledging their debts, and assigning them a rank in which they should be paid.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the tableau of distribution, filed by the syndics, be, and the same is hereby homologated, the costs of the appeal to be paid by the appellees.

Seghers, for the plaintiffs.

Babin *et al. v.* Laine *et al.* IV, N. S. 611.

SECOND District.

The third possessor, who makes no defence when cited by the mortgagee, cannot afterwards stay the execution. Civil Code, p. 462.

Corporation *v.* Paulding. IV, N. S. 614.

FIRST District.

If the appellant was not a party to the original suit, and the facts on which his right of appeal rests, be denied, the case will be sent back to have them tested.

Akin *et al.* *v.* Bedford *et al.* IV, N. S. 615.

The plaintiff is not bound to exhibit any proof of his allegations which are not denied by the answer.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiffs claim 4732 dollars 4 cents, the net proceeds of fifty hogsheads of tobacco, sold for them by the defendants.

The answer admits the defendants received fifty hogsheads of tobacco of the plaintiffs, which they sold, according to the instructions of the latter, and remitted to them a draft of E. Fiske, for 4732 dollars 4 cents, the net proceeds.

The plaintiffs were nonsuited and appealed.

It appears that the case was submitted to the district judge, on the petition and answer. He thought the plaintiffs had not made out their case, and could not recover without using the answer in evidence; and if they did, this document, with the admission of the debt, contained an averment of payment, which could not be separated from the admission.

We are of opinion that the allegations of the petition, so far as they went to establish the sale of the tobacco by the defendants, for the plaintiffs, not being denied by the answer, the latter were not under any obligation to administer evidence of it.

The answer denied the liability of the defendants, on the ground that they sent the plaintiffs a draft in payment. It does not even

allege that this remittance was made by order of the plaintiffs. Even if it did, this circumstance ought to have been proved; for every fact, not admitted in the petition, advanced by the defendant, is, according to our practice, (which does not admit of a replication,) held to be denied by the plaintiff.

The court, in our opinion, erred in nonsuiting the plaintiffs; and as, on this being done, the defendants could not well have introduced evidence in support of their averment, we cannot well give a final judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the case remanded for trial, the defendants and appellees paying costs in this court.

Eustis, for the plaintiffs.

M'Caleb and *Byrnes*, for the defendants.

Troppe *et al.* v. Bayon. IV, N. S. 618.

SECOND District.

When the evidence is contradictory, damages will not be given on appeal for frivolity.

Barbegur *et al.* v. Their Creditors. IV, N. S. 434.

FIRST District.

Where the cession is accepted and a syndic appointed, the insolvent has no power to affect the rights of the creditors who voted for syndics and bring the proceedings before the court.

The tableau of distribution cannot be homologated till the creditors are cited, and this should appear on the record.

Lafitte v. Duncan. IV, N. S. 622.

An appeal cannot be granted to a party who is without pecuniary interest.

FIRST District.

PORTER, J., delivered the opinion of the court.

The defendant has applied for a rule on the judge of the first district, to show cause why a mandamus should not issue, compelling him to grant an appeal from an order, by which the defendant was directed to hand over to his successor in office, the books, papers and documents belonging to it.

The judge has returned, as cause for his refusal, that the defendant had no pecuniary interest in the subject-matter on which the mandamus was granted; that the records belong exclusively to the public, and not to him.

The defendant, in controverting this return, has very properly admitted, that when a notary resigns his office, the documents and papers belonging to it are not his property, but the public's; but he has contended that the order goes too far, for it embraces papers which belong to him in his private and individual capacity; such as copies that may be already made out of deeds heretofore passed in it.

If the order granted by the judge was understood by us in that light, a proper case of appeal might perhaps be made out; but the court understands it in a quite different light. Its words are, "The books, papers and documents which appertain to the office," and mean nothing more than those things which he was bound to preserve his official capacity.

Let the rule be discharged at the cost of the defendant.

Ripley and *Conrad*, for the plaintiff.

Seghers, for the defendant.

Franklin Bank *v.* Nolte *et al.* IV, N. S. 624.

FIRST District.

If a creditor sues an insolvent debtor who has not put him on his bilan, the case will be cumulated with the proceedings of the other creditors. Affirmed upon the decision in Taylor *v.* Hollander, 4 *N. S.* 535.

Clark *v.* Oddie. IV, N. S. 625.

FIRST District.

This was the case of a judgment signed on the 14th of April, when the order suspending all proceedings against defendant had been already made on the 12th. *Held,* no judicial proceeding carried on after that order could give one creditor preference over another.

Jordan *v.* White. IV, N. S. 626.

PARISH Court of New Orleans.

Case of a decree of judge *a quo* turning on questions of fact, which the Supreme Court now affirm *of course,* the conclusion of the judge from the evidence not being manifestly erroneous.

Dreux *v.* His Creditors. IV, N. S. 629.

FIRST District.

A mortgage creditor does not lose his rank, because the register overlooked his mortgage.

If the mortgagor's wife renounces her right, she will be postponed to the mortgagee.

Astor *v.* Syndics of Saul *et al.* IV, N. S. 632.

If a creditor claim to be paid by the preference on the insolvent's bank stock, pledged to him, his claim must be settled contradictorily, with all the other creditors, after the tableau is made.

FIRST District.

PORTER, J., delivered the opinion of the court.

The petition appears to have been filed in this case after the parties defendant had become insolvent, and before syndics were appointed. The plaintiff alleges that he lent to the defendants 64,000 dollars, on a pledge of stock of the Bank of Orleans, to the same amount, and the certificates for the same were delivered into his possession. He avers that he has reason to believe that other creditors will obtain judgments against the pawnors, and have the stock disposed of to his prejudice. He, therefore, prays for a sequestration of the property, that his rights, liens and claims on it may be declared valid; and further, that it may be decreed to be his property, and sold or otherwise disposed of as the law directs, for the payment and satisfaction of his debt.

A supplemental petition, subsequently filed, made the syndics parties, and they appeared and pleaded the general issue and the nullity of the privilege set up, in consequence of the neglect to record it.

The case was tried on its merits in the court below, and argued here on the same grounds.

[Astor v. Syndics of Saul *et al.*]

We are of opinion that the cause is not before us in such a shape, and at such a time, as that final judgment can be given on it.

It is too clear to admit of argument, that the pledge set up by the plaintiff, supposing it clothed with all necessary forms, did not transfer the property; it still remained in the insolvents, and only conferred a right to be paid in preference to other creditors.

It follows, then, that this property must pass into the hands of the syndics, be sold by them, and the proceeds enter into the general mass; and that out of these proceeds the plaintiff will be paid, according to the rank and order of his privilege.

What that rank and order may be can only be settled contradictorily with the other creditors, on the syndics filing their tableau of distribution. A judgment rendered now, would not form *res judicata* on the matter put at issue. In every *concurso*, all the creditors are at once plaintiffs and defendants, and most especially so to dispute the preference which one may claim over another. The syndics cannot, either by their admissions or by a judgment in a suit carried on against them, conclude the creditors as to a preference claimed, for each has a right to contest it individually, after the tableau is filed. To sanction the course of proceeding resorted to, would be introducing a practice which would lead to great confusion, and most unnecessary expense. Instead of the claims of all the creditors to privileges being settled in one judgment, we should have as many separate suits as there were creditors. If legal, these suits could have no useful object, because the relative rank of each can only be ascertained after hearing all, and that can not be done before an opportunity is given to all to present their claims. As these reasons would not be so strong if judgment was pronounced against the plaintiff, it may perhaps be supposed that this opinion implies that he must recover; but we desire to guard against such inference, by stating, that the conclusions to which we have arrived, are drawn from reasons applicable to all cases so circumstanced; and that it is to be understood that nothing is decided in relation to the merits of that now before the court.

In whatever point of view, therefore, the subject can be considered, the judgment of the court below was erroneous: the cause ought to have been cumulated with the other proceedings in *concurso*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that this cause be remanded to the district court, to be proceeded in according to law, the appellees paying the costs of this appeal.

Grymes, for the plaintiff.

Eustis, for the defendants.

Leblanc *v.* Johns. IV, N. S. 635.

FOURTH District.

If a party prays for a jury, and yet suffers the trial to proceed without one, being present, the jury is waived.

Ludeling's Syndics *v.* Poydras's Executors. IV, N. S. 637.

THIRD District.

If the law, which prescribes the mode of citing an insolvent's creditor, when the syndics present the tableau, be repealed, and the proceedings are continued on to final judgment, without any objection below or in this court, the error is waived.

Creditors are cited to oppose the tableau, by publications, but to bring them into court in the first instance, personal notice is necessary as to those who reside in the parish.

In New Orleans, publication in the papers, or a notice stuck up may be resorted to.

Brown *v.* Saul's Syndics. IV, N. S. 640.

FIRST District.

Same case as Astor *v.* Syndics of Saul and Morgan, 4 *N. S.* 632.

Brooke, Allen & Co. *v.* Louisiana State Insurance Company. IV, N. S. 640.

In a policy of insurance the written controls the printed part.
Discussion of the principle, *that a total loss of any part, is a total loss* within the meaning of the policy.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action is brought on a valued policy of insurance. The plaintiffs claim the whole amount. The defendants pleaded the general issue. The cause was submitted to a jury, who found a verdict for the petitioners for 4500 dollars. Both parties appealed.

The policy is in the usual form, and contains at the bottom the common list of *memorandum* articles. Underneath this enumeration there is written:

"This insurance is declared to be on cargo, valued at 11,000 dollars.

"Mules on and under deck against standing or a total loss."

The defendants and appellants have made, in this court, the following points:

1. The valuation of the cargo, made by the plaintiffs, was erroneous, extravagant and void. Phillips on Insurance, 306, 307.

2. The risk insured against was not fully and fairly represented by the plaintiffs. *Ibid.* 80 to 83.

3. The constructive total loss is excluded in all memorandum articles. Parke, 112, 113, to 115; Phillips, 483 and 488; 8 Cranch, 39 and 46 to 50; 1 Wheaton, 219, and 224 to 232; 2 Maule & Selwyn, 371 to 375.

4. The loss insured against, even if the insurance had been in the body of the policy, was an absolute, natural, or physical total loss, not a legal, technical, or constructive total loss. Marshall, 414, cap. 13; Phillips, 382, 383, 489, 490, and 491; 6 Mass. Rep. 465 and 471; 7 Johnson, 527.

5. In the construction of a policy of insurance, the written controls the printed part; and in the present policy the risk insured against is specified in writing. Phillips, 18 and 70; 4 East, 130, 135, and 140.

6. The destruction, or physical total loss *of a part* of the cargo insured, if it consists of memorandum articles, or articles insured against total loss only, does not amount to a total loss, so as to enable the assured to recover for the part so lost or destroyed. 1 Wheaton, 219; 7 Common Law Rep., 39 to 43; 3 *Ibid.* 127.

[Brooke, Allen & Co. v. Louisiana State Insurance Company.]

7. In case of a total loss, the valuation fixed in the policy remains, unless overrated, but a partial loss opens the policy, and the value of the thing lost must be proved. Phillips, 305 and 313; Park, 111; Marshall, 203.

8. The case ought not to be remanded, inasmuch as it is admitted the vessel arrived at her port of destination with part of the cargo.

The first objection is, that the cargo was overvalued. Arguments of this kind come with a bad grace from underwriters, if there was no intention to defraud them. They receive a premium for the whole amount stipulated in the policy, and are benefited *pro tanto;* they should therefore bear the loss, if the contract was in good faith. If indeed, it appeared that the value given to the articles put on board was to enable the insured to profit, by destroying the property protected by the insurance, the contract would be avoided. But, apart from these considerations, we can see no reason on which the policy should be annulled, from the mere fact of the articles insured being valued too high; it rather affords an argument in case of total loss, from which fraud is to be inferred, than a ground, which *per se* avoids the contract. Nothing in the evidence enables the court to say that such was the intention of the parties to plaintiffs. They evidently intended to cover the profits they hoped to make if the cargo reached safely the port of destination. Phillips on Evidence, 306 and 307; 6 Cranch, 220; 5 *Ibid.* 110; 3 Taunton, 506.

The second, that there was misrepresentation of the nature of the cargo, appears to us without any foundation. The description given of it in the policy did not restrict any portion of it to mules. The high rate of premium paid excludes the idea that information was not given to the insurers of what the cargo should consist. To avoid the contract on this ground, would be to presume fraud, without evidence affording any circumstances on which it could be inferred; again, the defence in the court below should have put the plaintiffs on the proof of this fact. But nothing contained in the answer warned them their claim would be contested on that ground.

The third, fourth, fifth, sixth and seventh points will be considered together, as they all depend on the proper meaning to be attached to the words used at the foot of the policy: "Mules on or under deck, against stranding or a total loss."

It has been urged on the part of the plaintiffs, that mules are not memorandum articles. They are certainly not generally considered such, but there is nothing which prevents them from being made so by the stipulations of the parties, and we think there can be no doubt that they were intended to be made subject to the same rules by this policy. We can conceive no reason for inserting the clause, unless something else was intended than the responsibility created by the policy in its usual form. The words used in relation to the articles of the memorandum, free from average, unless general, are convertible terms, "with responsible for a total loss;" or at least the latter words are as strongly restrictive as the former.

[Brooke, Allen & Co. v. Louisiana State Insurance Company.]

Many cases have been brought before the court, in which courts of justice have given a construction to the expressions used in policies, in relation to memorandum articles. On several of these it seems to have been considered, that there must be a loss of the whole of the thing insured, to enable the assurer to recover; that if any part of the thing protected by the policy reach the port of destination, the insurers were not responsible. In others, it has been held that where the cargo consisted of separate and distinct objects, a total loss of any part of it would enable the assured to demand the value of the object so destroyed. Phillips on Insurance, 488 to 491; 1 Wheaton, 219; 6 Mass. Rep. 119; 7 Johnson, 527; 15 East, 559; 7 Taunton, 154.

The weight of authority appears to us nearly alike. We therefore feel at liberty to adopt that construction which will best meet the intention of the parties; for unless there be some technical principle of law which stands in our way, the obligation is imperative on us to do so.

It has been contended with great force, that the decisions of those courts which have held that a total loss of any part, was a total loss, within the meaning of the policy were contrary to reason, and the very meaning of the words used: that such doctrine was confounding a partial with an entire loss; that the former was confessedly excluded from the risk, and yet the insurers, by a change of terms, were made responsible for it; that a part was less than the whole, and that the loss of the whole was only insured against.

This reasoning would be unanswerable, if by the expressions *a total loss*, were necessarily meant a loss of the whole cargo insured. But we do not understand, that in relation to this contract, these expressions are convertible. When used in relation to articles, other than those styled memorandum, or in relation to which a special agreement has not been made, we know that a loss of the one half, is considered in law a total loss. We know no reason why they should not be restrained in the stipulation before us, to what was the intention of the parties. The memorandum was introduced into policies, in consequence of the peculiar tendency of certain articles to decay. Now, in relation to a cargo, made up of distinct and separate objects, which the parties intended to place under the same rules, if their object was not to render the assurers responsible for any deterioration in the value, but for the absolute destruction of the thing insured, the words "total loss" would be as readily resorted to, to express that distinction as any other.

The evidence has satisfied us beyond doubt, that such was the intention of the parties to this contract. We do not believe that the premium would have been paid, if the condition had been understood by the insured to be, that if only one out of all the mules he put on board, reached the port of destination, he was to sustain the loss. The object of this clause, it appears to us, was to prevent the insurers from being responsible for any injury short of absolute destruction of the mules.

[Brooke, Allen & Co. v. Louisiana State Insurance Company.]

According to these principles, the insurers were only responsible for the mules that perished before the port of destination was reached. As the policy, therefore, is opened by a loss less than the whole, we had doubted whether the verdict was not for a larger sum than the law would sanction; but, according to the latest cases, in adjusting the loss on a valued policy, the practice seems to be, that the amount of injury sustained by a loss of the part, is made in reference to the valuation of the whole in the policy. This course is certainly the most equitable, where the agreement, in its origin, was free from fraud. The jury do not seem to have erred. Phillips on Insurance, 313—319.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Morse, for the plaintiffs.

Eustis, for the defendants.

Henderson *et al.* v. Morgan. IV, N. S. 649.

A conveyance, to secure, at the eve of bankruptcy, a creditor, to the injury of others, is *fraudulent*, and will be set aside.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiffs state, the defendant, sheriff of the parish, is about levying certain writs, on a lot of their property, pretending it belongs to West, the person against whose property these writs are directed. They obtained a provisional injunction.

The answer averred, that the deed from West, under whom the plaintiffs claim, is void against his creditor.

The bank of Louisiana and the syndics of the creditors of West intervened, and prayed that the sale under which the plaintiffs claim, may be annulled and set aside.

The plaintiff's petition was dismissed, and they appealed.

The statement of facts shows, that West's deed to Fort, the president of the branch of the Bank of the United States in New Orleans, dated November 21, 1825, was accepted by the latter, at the plaintiff's request, for the purpose of re-conveying the premises to them, as some security against their liability, as West's sureties, for a defal-

cation of 23,220 dollars, in his account as cashier of the branch bank. That this was the consideration of the conveyances from West to Fort, and Fort to the plaintiffs. West was, besides, liable to the bank for another sum of 20,000 dollars, for which the plaintiffs were not responsible, as he had taken it before they became his bondsmen. West then owed to the Bank of Louisiana 10,800 dollars, to the Mississippi Marine and Fire Insurance Company 6800 dollars, to Reynolds, Byrne & Co. 6000 dollars, to Wilkins & Linton 6342 dollars, to the Bank of Orleans 5400 dollars.

On the 23d and 26th of October, 1825, West fraudulently took from the bank of which he was cashier, 23,220 dollars. The discovery of his fraudulent conduct was made on the 21st of November, 1825, the day on which he executed the deed to Fort, and two days after the plaintiffs, being responsible as West's sureties, paid the sum they were bound for, and received a conveyance from Fort. West absconded on the 23d of November, and on the same day, after the plaintiffs had taken possession of the premises, they were seized by the defendant. On the same day, a warrant issued from the district judge of the United States against West; but he was not taken, and his place of refuge is unknown. George Johnston has been appointed the syndic of his creditors.

West's note to the Bank of Orleans is of September 25th, 1825, at sixty days; that to Reynolds, Byrne & Co. is payable the 1st of January, 1826; so is that of Wilkins & Linton.

The object of West, in making, of Fort in receiving, and the plaintiffs in soliciting, the conveyance, under which the latter claim, most evidently was to give and obtain a security, at a time when West was evidently unable to discharge the debt he had incurred to the bank by his dishonest conduct, and thus to give his sureties a preference over his other creditors, whom he was unable to pay. This the law forbids. Civil Code, 1965—1981. Hodge *v.* Morgan, 2 *N. S.* 61; Acts of 1817, p. 136, sect. 24.

The plaintiffs' counsel urges, there is no evidence of West's insolvency: his flight was owing to the criminal process out against him. He relies on *Part.* 5, 15, 10, which gives the right to a creditor who overtakes his debtor flying, to seize the property the debtor is carrying away, to the amount of the debt, without being bound to divide it with the other creditors.

The record shows, West owed very large debts, and the anxiety of the plaintiffs to procure the deed, is some presumption that at least, in their opinion, this measure was necessary to their security: besides, while such large sums appear due, those who allege the solvency, should show the existence of property sufficient to discharge them. Civil Code, art. 1980.

The law of the *Partidas* offers a reward to the creditor who arrests a debtor who flies: it authorises him to take, to the amount of his debt, the goods the debtor is carrying off with him.

Here the plaintiffs did not endeavor to arrest West: they seized

nothing he was carrying with him, indeed nothing that he could carry off; but they made with him a bargain which the law reproves, by which they sought to gain an advantage over their co-creditors. The district court did not err in disregarding their claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Grymes and *Eustis*, for the plaintiffs.

Livermore, for the defendant.

Fitz's Syndic *v.* Hayden. IV, N. S. 653.

PARISH Court of New Orleans.

The state court is judge of the sufficiency of the sureties offered, on an application to remove a case to the court of the United States; and the Supreme Court will not interfere, if that discretion be properly exercised.

Littlejohn *v.* Ramsay. IV, N. S. 655.

FIRST District.

An agent who surrenders a note belonging to his principal, and takes one payable, at a distant day, to himself, and delays bringing suit at maturity, is chargeable with its amount.

Gonzales *et al. v.* Sanchez and Wife. IV, N. S. 657.

An ordinance of a Spanish governor, in 1770, of which neither the original nor a copy can be had, requiring all sales of land to be made before a notary, when no authority in the governor is shown to change the general law of the land, and when the Superior Court of the late territory refused to recognise it, will not now be regarded.

SECOND District.

MARTIN, J., delivered the opinion of the court.

In 1777, the Spanish government granted the premises to the father of Mrs. Sanchez, and in 1787, he made a verbal sale of them to Andrew Vega, and received the price; Andrew Vega and his son Anthony possessed and cultivated the premises in the lifetime of the vendor.

Andrew died soon after, and his son continued in possession: and in 1789 married Andrea Paballico, now Mrs. Gonzales.

About this time Mrs. Sanchez's father died, she then being six or seven years of age, his wife having died before him.

Anthony and Andrea Vega had two children, viz. Anthony, junior, (now deceased, and represented by his two minor children Anthony and Mary) and Rietta, now twenty-two years of age.

Anthony, the father, kept possession and cultivated the premises till his death, which happened a few years before 1796.

His widow, having married Gonzales, made an inventory of his estate, on the eleventh of January, 1796, in which the premises were included, and valued, with the improvements, at 250 dollars; the estate of her first husband was placed in the hands of her second. He and her, and her daughter Rietta continued to, and still dwell on the premises.

In 1820, the present defendants brought suit against Gonzales, for the premises in his possession, which they claimed as part of the estate of Mrs. Sanchez's father, in which they succeeded, (11 *Martin*, 207,) and obtained a writ of possession; and Mrs. Gonzales, as widow of Anthony Vega, senior, Rietta, as his daughter, and the widow of Anthony Vega, junior, as tutrix of his two children, opposed the execution of the writ, and obtained an injunction.

Sanchez and wife, now defendants, in their answer claimed title; and in an amended one denied that the present plaintiffs had the actual possession of the premises. The injunction was dissolved and the plaintiffs appealed.

Our attention is first drawn to a bill of exceptions taken to the opinion of the district judge, in rejecting evidence of the verbal sale.

[Gonzales *et al.* v. Sanchez and Wife.]

The introductiou of the evidence was opposed on the second ground, that by a law of the *Nueva Recopilacion*, 9, 17 and 10, sales of real estates are required to be made before a notary, and by an ordinance of Unzaga, a like provision was introduced, and verbal and *sous seing privé* sales of land are prohibited.

The law of the Recopilacion cited, is avowedly and expressly a fiscal law, enacted for facilitating the collection of a duty, *alcavala;* and as the province of Louisiana was exempt from that duty, the law was never considered as extending to it.

The ordinance of Unzaga* is a document of which neither the original nor any copy are now extant. The powers of the governors of the Spanish American colonies are detailed in the Laws of the Indies;

* Of this Ordinance, thus said to have perished from the archives and from private collections, the Editor is happy to furnish a faithful copy, for which he is indebted to the admirable library of *Alfred Hennen, Esq.*, of this bar, a collection as to which all the enlightened men of our state are clamorous in the demand that the state should purchase it, and make it the basis of a noble state library.

Don Luis de Unzaga et Amezago, Colonel des Armées de sa Majesté, son Intendant et Gouverneur Géneral de cette Province de la Louisiane.

Faisons savoir que l'experience nous ayant fait connaître les differentes fraudes et stellions aux quels sont sujets les ventes, échanges, permutations, brocantage et généralement toutes aliénations des négres immeubles et bien fonds qui se font et se passent clandestinement et en haine de la foi publique, par ecriture simple et privée, dont proviennent l'inquietude des citoyens, le renversement de ses droits et la confusion dans les tribunaux pour administrer la justice: d'un côté remédier à un abus si pernicieux, et d'un autre mettre cette Republique dans le bon ordre et gouvernment à l'instar de toutes les autres de la domination de sa majesté,

Mandons et ordonnons qu'aucune personne de quelque qualité et condition qu'il soit ne puisse dorénavant vendre, aliéner ou accepter aucuns esclaves, habitations, maisons, et batimens de mer, seulement que par contrats qui se feront pardevant un écrivain public, les quels contrats et actes de vente et aliénation seront précedés d'un certificat de l'anotateur des hypothèques sous peine de declarer nulle et comme non avenus tous autres actes qui se feront sous une autre forme, et par les acquéreurs ou vendeurs de n'avoir recours en droit sur les choses qu'ils auront acheté ou vendu ou permuté, ni les uns contre les autres, et sans pouvoir en acquérir une vraie et juste possession, et sous peine en cas de fraudes contre uns et les autres d'être poursuivis selon la rigueur do droit: comme l'écrivain et notaire qui abusera de la bonne foi que le public a reposé dans sa conduite et dans ses archives et qui sera assez osé pour anti-dater ou post-dater les actes qui se passent pardevant lui, pour ce forfait sera declaré indigne de son emploi et sera condamné aux autres peines établies; et oubliant le dit écrivain dans ses actes le certificat d'hypothèque il sera procédé contre lui suivant les circonstances du fait; et pour que personne puisse prétendre cause d'ignorance, nous avons ordonné et ordonnons que le présent sera publié au bruit du tambour, et copies, autorisés par l'écrivain de gouvernment public et cabildo, seront affichés an lieux accoutumés de cette ville, et envoyés dans tous les postes dépendans de ce gouvernment. Donn éen notre Hôtel de Gouvernment, le 9 Novembre 1770.

Luis de Unayo & Amerayo,
Par mandement de la Seigneurie.

and from no part of this Code does it appear that Unzaga was vested with authority to alter the law of the land in this respect. By *Partida*, 5, 5, 6, sales may be in or without writing. The governors of Louisiana were, however, in many instances, vested with ample legislative powers, often given them by the royal instructions. Hence when any act of theirs, not ostensibly within their legal powers, has been recognised and acted upon by courts of justice, this tribunal has presumed it was authorised by the king's special order. Rogers *v.* Bresler, 3 *Martin*, 665.

Under the Spanish and territorial governments, till the adoption of the Civil Code, which recognises sales of land under private signatures, such sales were carried into effect; the law of the Recopilacion, for the reasons given, not being considered as applicable to the country. As to the ordinance of Unzaga, it does not appear to have ever been considered of any legal validity, and the Superior Court of the late territory, in the case of Phillip *v.* André, totally disregarded it. It is now too late to give it effect for the first time, to the overthrow of titles, hitherto undisturbed. We think the judge erred in rejecting the evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and the case remanded, with instructions to the district court to admit the evidence of the verbal sale.

Derbigny, for the plaintiffs.

Workman, for the defendants.

Akin *et al.* v. Mississippi Marine and Fire Insurance Company. IV, N. S. 661.

The insured will recover on a valued policy, although the invoice cost of the goods be below the sum insured.

If a voyage be insured to *Key West* and the *Havana*, and the ship unnecessarily proceed to the last place first, this is a deviation.

But if she did so through bad weather, and the voyage to *Key West* fail, a recovery will be had for a total loss.

FIRST District.

[Akin *et al.* v. Mississippi Marine and Fire Insurance Company.]

MARTIN, J., delivered the opinion of the court.

The plaintiffs insured in the defendants' office their goods on a voyage, from New Orleans to Key West and Havana, on a valued policy, to the amount of 5000 dollars. When near Key West, the vessel encountered a gale, in which a considerable part of the cargo was damaged; and the captain thought it necessary to proceed directly to the Havana, where the flour was sold: and the reduction of the price on the damaged flour, and expenses induced the plaintiffs to abandon and claim the sum insured on a total loss. They had a judgment, and the defendants appealed.

The points insisted on this court, are:

1. That the plaintiffs had not on board goods to the amount of the sum insured.

2. A deviation.

3. That the defendants are liable for a partial loss only, which they have ever been ready to pay.

I. The defendants admit, the plaintiffs had on board 953 barrels of flour, worth 3613 dollars. In Hodgson *v.* Marine Insurance Company, 5 Cranch, 110, the Supreme Court of the United States held, that if a ship was valued at 10.000 dollars, and 8000 dollars insured, the contract would not be avoided on proof that she was really worth 3000 dollars only. The object of the valuation is, to prevent any future contest, and unless there be fraud, the party must be bound by a valuation he has assented to. The price stated was the cost of the flour, which subsequent charges must have increased. A valuation, which would be very high at the beginning of the risk, may be very low in a subsequent period, when great additional expenses have been incurred in the transportation of it. Phillips on Insurance, p. 307.

II. It is clear, that if the vessel had unnecessarily proceeded to the Havana, without first going to Key West, this would be a deviation; but in the present case, the damages sustained by the vessel during the gale, rendered it necessary to abandon the intended voyage to Key West, at least for the moment: the testimony, we think, fairly establishes this fact.

III. The plea that the defendants are liable for a partial loss only, and not for a total one, seems a waiver of the preceding means of defence: for, if there were fraud in the valuation, or a deviation in the voyage, the insurers would not be liable to any loss, partial or total. The loss in the present case, is a total one, because the intended voyage to Key West has been necessarily abandoned, and has failed. Phillips on Insurance, p. 390.

Lastly, it was urged in this court, though not stated in the pleadings, that flour is a *memorandum* article. There is actually a memorandum at the foot of this policy, and flour is not expressly mentioned in it: whether it be included under the words, "all other articles that are perishable in their nature," is a point which we have not thought ourselves at liberty to inquire into. It was certainly waived by the

admission, that the defendants were liable for a partial loss; which may have prevented the plaintiffs from introducing evidence of the usage in the port.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Peirce, for the plaintiffs.

Livermore, for the defendants.

Lartigue *et al.* v. Duhamel's Executor. IV, N. S. 664.

General expressions in a will are to be restrained by what precedes and follows them. So, a bequest of "1000 dollars, my movable estate, plate and jewels" will not entitle the legatee to *all* the movable or personal estate.

COURT of Probates of New Orleans.

MARTIN, J., delivered the opinion of the court.

The plaintiffs complain of the judgment of the court of probates, which did not allow to the wife the whole personal estate of the testatrix.

The legacy under which the claim arises, is in a will, in the French language, and the expressions used are, "la somme de $1000, tout ce qui composera mon *mobilier*, bijoux et argenterie:" literally, a sum of 1000 dollars, every thing that shall constitute my *movable effects*, jewels and plate.

The judge restrained the word *mobilier* to household furniture. There is perhaps no expression in the English language that presents the meaning which the word *mobilier* has in the French language, than *movable effects*.

Either, abstractedly taken, includes all the *personal* estate, as contra-distinguished from the *real;* the *movable* from the *immovable.* But, a testator's meaning must be taken from all that he has written; not from any single and detached word.

In the present case, it is impossible to conclude that the testatrix meant, under the expressione *mon mobilier*, to bequeath her money, jewels and plate; for she begins by bequeathing 1000 dollars, then her jewels, then her plate.

Were the words taken literally, the legatee would be entitled to all the personal estate, including money and debts, and a thousand dollars, to be raised out of the real.

[Lartigue *et al.* v. Duhamel's Executor.]

The French language under the word *mobilier*, includes something more than of *meubles meublans*, literally the household furniture; but our Code does not recognise any other distinction than that made by the court of probates; which we think correct. Civil Code, 464—472.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

Trabuc, for the plaintiffs.

Moreau and *Canonge* for the defendant.

EASTERN DISTRICT, JULY TERM, 1826.

Armor *v.* Cockburn *et al.* IV, N. S. 667.

Between creditors, the acknowledgment of their solvent debtor, is *prima facie* evidence of the debt.

If the consignor direct his goods to be sold for the payment of one of his creditors, and the consignee promises the latter to do so, the goods are not liable to be attached for another debt of the consignor.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

This suit commenced by attachment. It presents two questions for decision:

The first is, whether the intervening creditors have made proof of the debt due to them?

We think they have. The record shows the acknowledgment of the debtor, and that is *prima facie* proof in a contest between creditors, where the former has not become insolvent. The answers of the garnishees corroborate this acknowledgment.

The second is, whether on the following facts the intervenors or the plaintiff have the best right to the property attached?

The defendant, it appears, was indebted to both; he shipped twenty-five bales of cotton in Alabama, and delivered it to one Mason, with directions to sell the same on his arrival in New Orleans, and pay the proceeds to Banks, Miller & Kincaid, the intervening creditors, to extinguish, as far as they would go, a debt he owed them.

The cotton, on its arrival, was placed in the hands of the intervenors, as agents for the said Mason. Before service of the attachment, he informed them, that he had received the cotton from Cockburn, on the conditions already expressed; and that, in conformity with these instructions, he would pay over the proceeds to them; to which they assented. The cotton was not sold until after the attachment was levied.

We think, that after the promise made to the interpleaders, and accepted by them, the cotton could not be attached. We cannot distinguish the case from that of Gray *v.* Trafton, and we have never had occasion to doubt the soundness of the principle on which that cause was decided. The true test in such cases is this, that where the owner of the property has lost all power over it, and cannot change its destination, the creditors cannot attach; the converse of the rule being, that whenever the proprietor may sell and deliver, the creditor can seize. In this case that power was gone. After the person, in whose hands the cotton was placed, promised to pay the intervening creditors, he became personally responsible to them; and the owner could not, by a change of determination, have compelled him to pay the money to any other person. The argument constituted what is called a *stipulation pour autrui*, and once accepted, by those for whose benefit it was made, it could not be revoked. Civil Code, 1864; 12 *Martin*, 702.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Pierce, for the plaintiff.

M'Caleb and *Byrnes*, for the defendants.

Thomas *et al. v.* Woods *et al.* IV, N. S. 670.

FIRST District.

The plaintiff must fail if, instead of making his case certain, he only makes it probable.

Fisk *v.* Fisk. IV, N. S. 676.*

A petition to remove a case to the court of the United States need not be filed personally. The party is not precluded by the acts of the attorney, appointed by the court to defend him, in his absence.

FIRST District.

PORTER, J., delivered the opinion of the court.

This case comes up on an appeal taken from an order of the court below, transferring the cause to the district court of the United States.

The action was commenced by attachment, on the 12th of February; on the 14th, an attorney was appointed to defend the absent debtor, who on the same day applied to the court and obtained a delay of sixty days to file his answer, and correspond with the defendant.

On the 7th of April, the attorney for the absent debtor made an application to be allowed the further time of thirty days to answer, which application was sustained by the court, but afterwards the order granted on it was set aside, on a rule taken by the plaintiff's counsel.

On the 16th the court directed, that the appointment of the attorney to represent the absent debtor be rescinded, and that the defendant, having authorised Messrs. Watts and Lobdell to appear as his attorneys in this case, they have leave to appear as such.

They accordingly did so, and presented a petition to remove the cause to the district court of the United States for Louisiana, on the ground that the defendant was a citizen of Massachusetts, and the plaintiff of Louisiana.

The court directed it to be transferred as prayed for, and the plaintiff appealed.

The correctness of the decision of the judge *a quo*, is contested on two grounds:

1. That this was a plea in abatement, and that being put in by an attorney of the court, its jurisdiction was acknowledged.

2. That the acts of the attorney appointed by the court to defend the absent debtor, amounted to an appearance, and that the application of the defendant came too late.

I. The first objection, we are clear, is untenable: it is drawn from a system of law which is not ours; it has no support in authority, and the reasons on which it is founded, give it no recommendation

* Decided in 1825, but not reported until 1826.

with us. At common law, the defendant must plead to the jurisdiction of the court in *propria persona*, for he cannot plead by an attorney without leave of the court first had; which leave acknowledges the jurisdiction, and this leave is presumed to be obtained, because it cannot be supposed an officer of the court would put in a plea without its permission. 1 Bacon's Ab. 2. In point of fact, this reason completely fails with us, for no leave of the court is necessary to enable an attorney to answer. By our law no such exception is made to the power of those who represent others in court: it does not distinguish between pleas of this kind and any others. *Partida* 3, *tit.* 5, *law* 1; *Cur. Phil. Litigantes, p.* 1, *sect.* 10.

II. The second ground is not so free from difficulty: the application to remove is *stricti juris*. Each state has a right to declare what shall amount to an appearance in its courts, and if that which was done by the attorney appointed by the court, is under our law an appearance by the defendant, the application to remove came too late. But without a clear and positive provision, it cannot be considered such, because it would be contrary to the truth of the case, and because it would be concluding the defendant's right by an agent, to whom he had given no authority. In relation to the point under consideration, the adoption of such a principle would in almost every case deprive a defendant of the privilege of removing his cause; and this we cannot suppose the legislature of our state contemplated. The act of congress, which confers this right, prescribes two conditions for the exercise of it: First, that the defendant shall at the time of entering his appearance in the state court, file his petition to that effect; and, Secondly, offer good and sufficient security for appearing in the court to which he prays a removal. Now, the attorney appointed to defend has no authority to comply with the last condition; and if he had, the cases are few in which he could find security.

The laws of the United States evidently contemplate an appearance by the defendant: our act of the assembly proceeds on the idea, that he is absent, and has left no person to represent him; it therefore appoints an attorney to watch over his interests. The protection which it thus affords, was intended for his benefit, and not to prevent the exercise of rights which either the laws of the United States or of this state conferred on him. Acting on this principle, we held in the case of Stockton *et al. v.* Nasbuck *et al.*, that the attorney appointed to defend an absent debtor, could not, by pleading to the merits, waive the want of citation. 10 *Martin*, 472; 2 Binney's Laws, United States, 61, sect. 12; 1 *Martin*, 516. The giving bond to the sheriff, was not an appearance in court; and on the whole we are of opinion, the judgment of the district court should be affirmed, with costs.

Maybin, for the plaintiff.

Watts and *Lobdell*, for the defendant.

WESTERN DISTRICT, AUGUST TERM, 1826.

Bayon *v.* Towles. V, N. S. 1.

The vendee is estopped from asserting that the slave's habit of running away was disclosed to him as a qualified vice, whilst the deed contains an averment that it was stated as an absolute vice.

FIFTH District.

MARTIN, J., delivered the opinion of the court.

The defendant resists the payment of a note he gave the plaintiff for the price of a slave, on the ground that the sale ought to be rescinded, because the slave was, at the time of the sale, in the knowledge of the plaintiff, addicted to robbery and stealing, and in the habit of running away. There was judgment against the plaintiff: he appealed.

We cannot find on the record any proof of the slave being addicted to robbery or stealing; but it clearly appears he was in the habit of running away, in the knowledge of the vendor.

The bill of sale was executed for the vendor, who resided at Donaldsonville, by an agent of his, in New Orleans, and expressly states the slave to be sold as "a runaway and drunkard." But the defendant shows that the plaintiff, in Donaldsonville, represented to him (with the view to induce the acceptance of a bill of sale, without a warranty of the disposition to runaway) that the slave was only in the habit of absenting himself for a short period, and afterwards re-

turning of his own accord, and never wandered to any great distance; while said slave during the time he was in the vendor's possession, ran away and wandered as far as the Choctaw nation of Indians, and did not return of his own accord, but was seized and brought back.

This case is endeavored to be assimilated to that of Macarty *v.* Bagnieret, 1 *Martin*, 149, in which the Superior Court of the late territory held that the vendor having failed to disclose the disposition of the slave to run away, the clause of warranty, although formally excluded, was fraudulently so, and the vendor was liable.

In the present case, if it appeared that the disposition to run away was clearly misrepresented, the vendor should not recover; but it does not follow, from the circumstance of the representation at Donaldsonville, that the defendant was led into an error; for the bill of sale expressly states the slave to be sold as "a runaway," *i. e.* as one with the disposition to run away, which gives a right to the resolution of the sale—not as having the disposition to loiter around the house of his owner for a while, and then return, which the vendor called *petit marronage*, "a small runaway."

All the oral representations, which preceded the contract, must be merged in the solemn and authentic declaration contained in the deed of sale, and while by that document, the vendee acknowledges that he was put on his guard by the positive declaration of the person he contracted with, that the slave sold was a runaway, in the sense of that expression which excluded any recompense on that account, he cannot be permitted to say he acted under an impression received from anterior conversations with the vendor, directly in contradiction with the absolute and formal assertions on record—which must control every anterior and verbal one.

The vendor cannot be listened to, when he asserts that the habit of running away was disclosed to him as a qualified one, while he has acknowledged, under his hand, before a notary and two witnesses, that the vendor informed him of an absolute and unqualified running away.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiff recover the sum of fifteen hundred dollars, with interest at the rate of five per cent. per year, from the twenty-third of March, one thousand eight hundred and twenty-two, until paid; and that the slave, being mortgaged, be sold for this purpose. The defendant paying costs in coth courts.

Simon and *Bowen*, for the plaintiff.

Baker and *Brownson*, for the defendant.

Marc *v.* Church of St. Martins. V, N. S. 5.

A churchwarden is an admissible witness in behalf of the corporation of a church.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This action was instituted by the heir of the late curate of the parish of St. Martin, to recover a sum of money alleged to be due to his deceased uncle, for moneys paid and advanced for the use of the church (*Fabrique*) during his lifetime. Annexed to the petition is an account liquidated by the churchwardens, and signed by them.

The principal defence set up in the answer, is error in the settlement. It is alleged that, according to the tariff established by the Bishop of Louisiana in the year 1795, the curates of the parishes in the diocese had a right to receive a certain sum on each interment made by them, a portion of which was set apart for the use of the church. That the late curate acted under that tariff, and received a large sum of money to the use of the church, which he failed to pay over, or to account for in the settlement made by them; and that they were ignorant of the particular provisions contained in the tariff until after the decease of the ancestor of the plaintiff.

There are two bills of exceptions on record taken by the plaintiff, which, as he succeeded in the court below, have not been much relied on in the argument. The decisions excepted to, appear to us correct, and we proceed to examine one on which the defendants have relied as a ground for sending the cause back for a new trial.

On the trial, they offered one of the defendants on record, who was churchwarden, as a witness to prove that the settlement was made in error; and that the late curate had received many sums of money due to the congregation, which were not included in the account rendered. The witness was objected to, on the ground that he was a party to the suit, and that the law had permitted him to make proof in no other way but by interrogatories on facts and articles.

The witness offered was a nominal, not a real defendant. The party contesting the demand was the parish of St. Martin, not those whom they had appointed to manage their affairs, and represent them in court. The judgment could not have affected the witness in a greater degree than any other member of the congregation. The reason, then, on which the rule was established fails, and with it the rule itself. The expressions used in the Code, "that there shall be no longer any other mode of making proof of a fact, by either plaintiff or defendant, but by what is called the "interrogatory on facts

and articles," were most probably intended to exclude the decisory oath formerly known to our law. But admitting them to repel testimony in the shape it was presented here; still they leave the question open, nay, compel the court to go into the inquiry, whether the party offered as a witness, be really plaintiff or defendant.

The interest of the churchwarden in this case did not even extend to the costs, and the objection which would formerly have been open to him as a member of the corporation is removed by a special act of the legislature. 3 *Mart. Dig.* 182, *no.* 5.

We have held, in the case of Curtis *v.* Graham, that a co-defendant in an action of trespass, might be sworn as a witness. The reasons on which he was held competent, are certainly quite distinct from those which exist here. But the case shows that we did not consider the mere circumstance of the witness being a defendant on record, prevented him from giving evidence.

It has been contended that the case ought not to be remanded, because the proof offered could not have availed the defendant, as no legal obligation was shown on the part of the curate, to receive and collect the moneys for the use of the church. But the answer expressly alleges that he received moneys on account of the church; and the witness is stated in the bill of exceptions to have been offered to prove that he had so received them. If this be true, we are not prepared to say, at this stage of the proceedings, that the evidence could not have been of any use to the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: And it is further ordered, adjudged and decreed, that the cause be remanded to the district court, with directions not to reject the witness mentioned in the bill of exceptions, because he is a defendant on record. And it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Simon and *Brownson*, for the plaintiff.

Bowen, for the defendants.

Reels *v.* Knight. V, N. S. 9.

If in a suit for partition, the defendant set up a title in himself which is alleged by the plaintiff to be simulated, the court of probates has no jurisdiction of the case.
And the want of jurisdiction being *ratione materiæ* is not cured by consent.
An appellate court cannot give a judgment which the court *a qua* could not.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This action was commenced in the court of probates to obtain a partition of the estate of the mother of the plaintiff and defendant. The defendant set up title to himself in the premises, and the plaintiff alleged that the sale was simulated and fraudulent.

No plea was put in to the jurisdiction, the cause was tried on its merits, and judgment given for the defendant. The plaintiff appealed to the district court, where the case was submitted to a jury, who found a verdict in his favor, and from the judgment rendered thereon the defendant appealed.

The court of probates had no jurisdiction of a case like this. The question was title, of which the ordinary tribunals could alone take cognisance. This has been expressly decided in the following cases, and it is not necessary to repeat the reasoning on which they are founded. William *v.* Spencer *et al.*: Harris' Tutor *v.* M' Kee *et al.*; and Donalson *et. al. v.* Dorsey *et al.*; 4 *N. S.* 77, 487, 509.

The first case was precisely that before the court, and it too was an appeal to the district court. It was there contended that as the latter tribunal had original jurisdiction of the cause, it was well seised of it, in its appellate capacity. But we were of opinion that this circumstance did not cure the defect, because the appellate court never can give a judgment, which the court *a qua* could not.

The objection being to the want of jurisdiction *ratione materiæ*, consent did not cure it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the petition be dismissed with costs.

Ogden and *Brownson*, for the plaintiff.
Bowen and *Baker*, for the defendant.

Rawle *v.* Fennessey. V, N. S. 11.

The counsel for the absent heirs needs not any specific authority to institute a suit, under the 1207th article of the Louisiana Code.*

FIFTH District.

PORTER, J., delivered the opinion of the court.

The 1207th article of the new code provides, "that if in the interval between the opening of the succession, and the appointment of the curator, there are many conservatory acts to be performed or suits to be instituted, the delay of which may injure the succession, the counsel for the absent heirs shall be authorised to perform such acts or institute such suits before any court, on proving his appointment by the certificate thereof under the seal of the court which has appointed him."

The construction given by the judge *a quo* to this article has produced the present appeal.

The plaintiff states himself attorney for the absent heirs of a succession, avers that a sum is due it by the defendant, and that further delay in collecting it might endanger the loss of the debt.

The defendant pleaded various exceptions; none of them require particular notice except the 4th and 7th, which state, that the suit should have been brought in the name of the curator of the vacant estate, and that the plaintiff had not prayed and obtained leave to institute and maintain this action as counsel for the absent heirs.

The judge *a quo* considered this objection as fatal, and dismissed the suit. In the opinion delivered, he has not stated the reasons for coming to this conclusion. We have considered the subject attentively and are unable to agree with him. The phraseology of the article is not clear and explicit, it is, therefore, the duty of the court to seek for the meaning of the legislature in the motives which we must suppose produced the enactment, and to give that construction which will best promote the remedy intended to be conferred.

The reasons which we must suppose influenced the legislature, were the necessity of the attorney for the absent heirs, or some other person, acting in cases where delay might occasion a loss to the succession. By compelling them to produce the proof and obtain an authorisation for each particular suit, the conservatory objects con-

* The appellation, Civil Code, is to be understood as rigorously applying to that of 1808; the work now in authority, being the result of the former system as transformed by amendment, is always to be known as the *Louisiana Code*.

templated by the remedy given, would in many instances be defeated. Nor would the defendant be in any respect, that we can discover, protected or benefited, by requiring this formality to precede the suit; for if justice be his object, it is better he should meet the plaintiff at once in the principal suit, on the grounds on which he asserts a right to sue, than be obliged to contest an authority which has already been sanctioned by the court.

We understand the expressions "he shall be authorised to sue," equivalent to; he shall have the power to sue. The language used in the article is, *verbatim*, that used in the 31st section of the act in relation to insolvent debtors: and we are not aware that a special authorisation has been held necessary for the syndics to release the mortgages existing on the property of the ceding debtor. Acts of 1817, sect. 31.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the case be remanded to be proceeded in according to law, and that the appellee pay the costs of the appeal.

I. L. Baker and *J. Baker*, for the plaintiff.

Markham and *Fennessey in propria persona*, for the defendant.

Perry *v.* Gerbeau and Wife. V, N. S. 14.

The attorney in fact to whom the plaintiff had endorsed a note for collection, may be permitted to strike out the endorsement, at the trial.

Evidence of the admissions of the party is of the most dangerous kind.

A wife is not bound by a note executed jointly and severally with her husband, on a contract which did not turn to her advantage.

FIFTH District.

PORTER, J., delivered the opinion of the court.

The defendants in the original answer, pleaded the general issue, and afterwards, with leave of the court, a plea by which they averred "that a partnership for the purchase of cotton existed between one of them and the plaintiff, in the years 1818 and 1819: that they were to share the profits and losses equally, and that a loss was sustained in purchasing and selling this cotton, to the amount of 2400 dollars, one

half of which sum should be taken as an offset against the claim set up in the petition.

The first question necessary to be decided arises out of an endorsement made on the note by the petitioner previous to the institution of the suit, and existing on it at the time of the trial.

On offering it in evidence the defendants objected that as the petitioner, who was payee, had endorsed it over to his attorney in the present case, it could not be received in evidence, the legal title being vested in another

The counsel for the plaintiff then applied to the court for leave to strike out the endorsement, which leave was granted. The defendants excepted to the decision.

In the bill of exceptions it is stated by the judge, that he granted the permission prayed for, because the plaintiff's attorney was the endorsee.

It is certainly a well established principle of law, that actions can only be maintained on notes or obligations by those in whom the legal title is vested. This has been admitted in argument: and it has also been conceded that the apparent legal title was not in the plaintiff at the time the suit was instituted, but it was urged that in point of fact the real interest in the note always was in the payee; and that proof of these facts could be, and was given, at the time of the trial.

If it followed that, in all cases, the legal interest in a note was vested in the person to whom it was endorsed, or to whom, by its terms, it was made payable—then, perhaps, the objection taken by the defendants, would be valid. But, in many instances, these facts only afford *prima facie* evidence of the legal interest. In the case of an endorser who, on the failure of the maker of a note, or the acceptor of a bill, has been obliged to take it up; it is plain that although his name still remains on the bill, yet, by the fact of payment, the legal right to it is revested in him—and that, on producing the note and proving this payment, he can recover on it. So, where the drawer has been obliged to pay the amount of a bill of exchange to the payee, in consequence of the acceptor's failing to discharge it. And in the latter case it surely would not be necessary to strike out the name of the payee in order to maintain the action. To require such a formality would indeed be inconsistent with the allegation necessary to enable the drawer to recover from the acceptor.

Being satisfied, therefore, that the fact of the endorsement remaining on the bill, was not conclusive evidence that the right was out of the petitioner, we think the court did not err in permitting the person to whom it was endorsed, to prove that he had no title to the note; and certainly he could not have given better evidence of this fact, than by first suing in the name of the endorser, and then striking out the endorsement.

There is nothing in what has been just said which has a tendency to shake the doctrine established in the cases of Thompson *v.* Flower *et al.*, and Robson *v.* Early. In neither of them did there appear

any evidence of right to the instrument sued on, but that which resulted from the possession of it. In the latter case, it was the endorser, and not as here the endorsee, who offered to strike out the endorsement. The expressions used in the case of Moore *v.* Maxwell, must be understood in relation to the case then before the court. The whole opinion is predicated on the want of evidence to show the plaintiff had any interest in the note. 1 *N. S.* 301, 373; 2 *Ibid.* 249.

The second question which the cause presents, also arises on a bill of exceptions. The defendants offered to prove, at the time the mortgage was executed, an admission had been made by the plaintiff, that there were losses on the partnership which had existed between the parties, for the purchase of cotton, to the amount of 1600 dollars, for which the petitioner had promised to send one of the defendants goods. This evidence was objected to, and rejected by the court.

The claim set up in the answer, was one in reconvention, and was too general. Such demands should have the same certainty as a petition. The evidence offered was to prove a distinct contract to send goods, of which no intimation was given by the pleadings; and it was attempted to be proved by the most dangerous * of all evidence, parol proof of the admissions of the party.

We think, therefore, the judge did not err in rejecting the testimony, but he erred in giving judgment against the wife, as, by the evidence introduced by the plaintiff himself, it appears she was not bound by the contract. Wives are not responsible for the agreements which they enter into jointly, or jointly and severally, with their husbands, unless it is shown they have renounced those laws made for their protection, or that the contract has been profitable to them. 7 *Martin*, 465; 4 *N. S.* 388, 230.

As it is possible the husband may have a claim against the plaintiff, for the losses sustained by the partnership, we shall reserve him his right to enforce it in a separate action.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiffs do recover of the defendant, Joseph Gerbeau, the sum of two thousand eight hundred and forty-two dollars and fifteen cents, with three per cent. interest from the 25th of August 1821, until paid, and costs in the court below, those of appeal to be borne by the appellee. And it is further ordered, adjudged and decreed, that the mortgaged premises be seized and sold to satisfy the judgment rendered in the case; and that nothing contained in this decree shall affect the right of the defendant, J. Gerbeau, to hereafter enforce any claim for losses sustained by the partnership set forth in the annexed answer filed in the case.

Brownson, for the plaintiff.

Simon and *Fennessey*, for the defendants.

* By *dangerous* the court is supposed to mean most likely to mislead.

Carlin *v.* Dumartrait *et al.* IV, N. S. 20.

FIFTH District.

The transfer of a debt vests only an inchoate right in the assignee, and, until notice to the debtor, any creditor of the assignor might pursue it. Civil Code, 368, art. 128.

Ozanne *v.* Delille. V, N. S. 21.

COURT of Probates of the Parish of St. Martins.

On an application to dismiss a tutor, evidence may be given of his incorrect conduct in transactions with other persons, when they have been specifically stated in the complaint.

He cannot be allowed to show that the petitioner (who does not solicit the tutorship) lives with a woman of color.

On a charge of bad morals in the tutor and of such neglect as endangers the minor's property, evidence cannot be given of the neglect of their education.

It is not a good ground for the *removal* of the natural tutor, that he failed to make an inventory in ten days after his appointment.

Neither is his insolvency *before* his appointment, a cause of removal.

Gonsoulin's Heirs v. Brashear. V, N. S. 33.

A party who obtained the governor's order to be put in possession of vacant land, in 1783, but does not appear to have taken it, cannot evict one who obtained a similar order in 1802, and is in possession under it.

FIFTH District.

PORTER, J., delivered the opinion of the court.

The plaintiffs claim a tract of land in possession of the defendant, who pleads title to it in himself.

Both parties assert a right to the premises in virtue of orders of survey issued by the Spanish government, and since confirmed by the commissioners of the United States. The *locus in quo* is admitted to be the same.

That of the plaintiff is eldest. It is dated in the year 1783. The petitioners in their *requete* state, that the island which they solicit is situated about four leagues to the west of the mouth of the river Chaffalaya, and that they wish to obtain a title in order that they may form an establishment, to supply the capital in case of need with pork and bacon.

The commandant of Attakapas certifies, that the land solicited is of no value, except for the objects mentioned in the *requete*. The governor directs the surveyor general, to place the petitioners on the land solicited, conformably to their memorial.

From the issuing of this order of survey up to the time of applying for the commissioner's certificate, in the year 1816, it does not appear that the plaintiffs or those under whom they claim, ever exercised any acts of ownership over the land in question. They never placed slaves or hogs on it, as they stated in the petition they would do: nor ever paid taxes on it as making a part of their property. An attempt was made on the trial to prove they had complied with the engagement contained in their *requete*, but the evidence wholly fails to establish it.

The title of the defendant is founded on an order of survey, dated in the year 1820. An actual survey of the premises was made. An actual settlement took place, and with the exception of three or four years' absence, during which time taxes were regularly paid, the land has been inhabited up to the commencement of this suit.

The government of the United States have relinquished their title to both, and the parties so far as their rights may depend on any sanction from that source, stand with equal pretensions before the court. They are therefore both thrown back on their titles, under

the former government. If these titles were complete grants, their date would decide the question, for the title having once passed from the sovereign to the subject, he could not grant it to another. But the orders of survey on which each of the parties claim, left the title or dominion of the soil vested in the government. They furnished an equitable right to those in whose favor they issued, to demand a title of the grantor, but nothing more; a reference to the various negotiations made by the Spanish authorities during the time Louisiana was possessed by that government, we think clearly shows, that the dominion of the soil was not to be considered as vested in the person applying for land, until the grant issued. The government of the United States when they took possession of the country, by requiring all those who had inchoate titles to present them for approval, showed that they considered they required confirmation and a patent to vest the title.

As therefore the legal title was not vested in either plaintiff or defendant under the former government, their rights must be decided by ascertaining which of them had the strongest equitable one, or in other words, which of them, according to the laws, usages and customs prevailing while that government had possession of Louisiana, would have had the best right to the premises.

We think there cannot be a doubt the defendants would. The policy of the Spanish government, as is well known, was to invite emigration and promote the settlement of the country. All the general regulations in relation to land in the province, and almost every order of survey they issued, proves that the motives just mentioned were the ruling ones. Repeated proclamations of the governors declared all orders of survey null, the land conceded in which, was not settled within a limited time. The plaintiff's pretensions tried by this test are entirely defective. In 1783 their ancestor applied for the land, and held out to the government as an inducement to grant it, that it was unfit for any other purpose but that of raising hogs, and that if given to him he would proceed to place slaves and swine there to succor the capital with meat of that kind. During the space of nineteen years that had elapsed from the granting this order of survey until the issuing the second, he failed to comply with the promise. It was not surveyed, nor settled, nor even taxes paid on it. Under such circumstances, as there was no legal obligation on the part of the government to issue a grant for the land, we are satisfied there was no moral one. And we are of opinion that, if the parties now before us were each claiming a title from the Spanish government had it remained here, and contesting the validity of each other's pretensions, the title of the defendant would prevail.

This opinion renders it unnecessary to examine the question of prescription.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Simon and *Baker*, for the plaintiffs.

Brownson, for the defendant.

Dumartrait *v.* Deblanc and Wife. IV, N. S. 38.

FIFTH District.

A wife cannot offer to prove, without having pleaded, that the note was given for a debt of her husband and not for her benefit.

No issue is to be tried, which is not presented by the pleadings.

Garland *v.* Lockett. V, N. S. 40.

FIFTH District.

The attorney in fact of absent heirs may maintain an action in his own name on a note he received in settling their claim against the maker.

The past use of money is a good consideration to support a promise to pay interest.

The use of the money forms a good *consideration* for such promise. This contract is called in our law *constitutæ pecuniæ.* See *Pothier, Oblig. part 2, cap. 6, sect. 9, Constitutæ Pecuniæ, no.* 3 and 8. Also, 2 Blackstone, p. 446.

Debaillen *v.* Ponsony. V, N. S. 42.

COURT of Probates of St. Landry.

An appeal lies from the refusal to set aside a writ of sequestration. It cannot issue on an affidavit that the defendant intends to remove his property out of the parish.

The term *jurisdiction of a court* in relation to place, means the limits within which its original process extends, not where its writ of execution may run.

Stille *v.* Brownson. V, N. S. 48.

FIRST District.

This case was declared not to be distinguishable from that of Abat *v.* Casteres, 3 *N. S.* 220; in which, it was *held*, that the purchaser at a sheriff's sale cannot refuse payment on the ground he acquired no title, unless he shows he was evicted. See, also, Tabor *v.* Johnson *et al.*, *Ibid.* 674.

Day and Wife *v.* Thibodeau. V, N. S. 48.

FIFTH District.

A will, valid and legal, according to the law of the place in which it was made, vests the property bequeathed in the legatee.

Skillman and Wife *v.* Lacy. V, N. S. 50.

The court of probates is not without a jurisdiction *ratione materiæ* in a case in which some of the defendants are minors and some majors.

The issue of a mortgaged female slave, born after a sale by the mortgagor, are in the hands of the vendee unaffected by the mortgage.

COURT of Probates of the Parish of St. Mary.

MATHEWS, J., delivered the opinion of the court.

This is an appeal taken by the heirs of the original defendant, who died since the judgment rendered in a suit against him, from a judgment given in the court above stated, against them in their capacity as heirs, which decreed the original judgment to be executed.

The first objection to the proceedings of the plaintiffs, is a plea to the jurisdition of the court of probates, which comes rather ungraciously from the defendants, as they had succeeded in a plea of the kind before the district court, in consequence of which, the present suit was commenced before the court of probates. We are of opinion that the latter court is not wholly without jurisdiction *ratione materiæ*, and although some of the defendants might possibly have been sued before the tribunals of ordinary jurisdiction, yet as part of them are minors the whole affair was well submitted to the probate court, more especially as to a mortgage on property of their ancestor.

Another objection is found on the record to rendering the original judgment executory, on account of uncertainty. We however believe it to be sufficiently certain to authorise the seizure of the mortgaged property, being clear and explicit to the amount of 3000 dollars.

Having thus disposed of these preliminary difficulties, we proceed to examine the errors complained of by the appellant in the judgment rendered by the court below. The property on which the tacit mortgage of the plaintiffs existed was two slaves, one of whom is a female. They were sold and delivered into the possession of the ancestor of the defendants by the legal owner, against whom the mortgage which affected them was raised by operation of law. After the sale and transfer above stated, the female slave had several children, who by order of the court of probates have been seized, with the mother, and directed to be sold to satisfy the plaintiffs' demand. This part of the judgment, the defendants allege to be erroneous, and insist, that however well established the general principle of law may be, that the fruits of mortgaged property are subjected to the mortgage while in the hands of the mortgagor; they cease to be subject to that bond or lien, when they accrue after a regular transfer of the original property

to a *bona fide* purchaser and possessor. The doctrine thus assumed by the counsel for the appellants is, in our opinion, fully supported by the authorities which they cite. See *Cu. Phi. ver. Hypoteca* and R. D. B. 20, 1, 291. But it is contended on the part of the plaintiffs, that as some of those children, if not all, were born since the commencement of the suit against Lacy the ancestor, he and his heirs have been, ever since that period, possessors in bad faith and are therefore bound to suffer the fruits or offspring of the slave, to be sold for their benefit. We are, however, of opinion, that a possessor under a legal title, in good faith, does not lose the advantage of such good faith until an order of a competent tribunal compels him to surrender to some equitable claim or lien, the property by him thus legally held. According to the laws above cited, the children of the female slave, being born whilst the mother was in the possession of the ancestor of the plaintiffs, they became his property in clear and absolute ownership, unencumbered by the tacit mortgage of the appellees; and we have been unable to discover any facts in the record which in any manner infringe this absolute right acquired by the father, and which has descended to his children.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be avoided, reversed and annulled: and it is further ordered, adjudged and decreed, that the order of seizure and sale, which is hereby granted, be restrained to the property or slaves who were affected by the mortgage of the plaintiffs, whilst they were in the hands of Haney, the vendor to Lacy, and it is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal.

Simon and *Bowen*, for the plaintiffs.

Baker and *Brownson*, for the defendant.

Sprigg *v.* Boissier and Wife. V, N. S. 54.

The wife is not bound by a note executed jointly with her husband, even in the hands of an endorsee: and when it was given for property, bought by the husband during the marriage.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This action was instituted by the endorsee of a promissory note, against the defendants, makers thereof.

[Sprigg v. Boissier and Wife.]

There was judgment in the district court against the husband and in favor of the wife. The plaintiff appealed, and has complained of that part of it, which exonerated the latter from responsibility.

The note is in the usual form of negotiable paper; it is joint and several, and it is shown by the evidence, that it was given in payment of property purchased by the husband.

The contract, therefore, did not bind the wife; she was in reality nothing but surety, and we have held that the prohibition against her entering into such contract, could not be avoided, by giving to the agreement the form of an obligation *in solido*. Banks *v.* Trudeau, 2 *N. S.* 29.

But the appellant urges, that this contract must be as binding on the wife, as if she was named vendee in the act of sale of the property for which the note was given. "Because whether the act of sale be made to the husband alone, or to the wife, or to them jointly, the effect is the same if it results to their common benefit."

It is true the benefits of a purchase made by the husband may be shared by the wife, but it is not true that she becomes the owner of the property, for he may sell it, exchange it, or even give it away without her consent. Had her name been inserted in the act of sale she would have held the one half of the land, in her own right. It could not have been alienated without her consent, and without the pursuance of those formalities which the law has established for her protection. There is no ground for assimilating the two contracts, and we are quite clear, that the agreement entered into in this case did not bind the wife.

The appellant, however, insists that though this note might not have been good in the hands of the payee, yet that in those of an endorsee for a valuable consideration, the wife cannot resist the payment. This doctrine if sanctioned by the court, would certainly afford a safe and compendious way, of evading the whole of our laws for the protection of married women. In support of this position he has relied on that part of our mercantile law which prevents the consideration of a note being gone into in an action by the endorsee, and has referred us to several cases where it has been held, that unless the illegal consideration was such as made the contract void, the maker could not resist the payment. This is true when the objection arises from the consideration, but when it is derived from the incapacity to contract, then that, which had not a binding effect when it was made, cannot acquire it by endorsement. Thus by the law merchant, the contract of the infant is only voidable, and yet a note executed by him, cannot be recovered on by the endorsee. Admitting the act by which a married woman becomes surety for her husband to be voidable only, we are unable to distinguish her case from that of an infant at common law. But it is unnecessary to put the case on that ground, for the law of Toro, so often cited in the court, declares that the engagement of the married woman, by which she became surety for her husband, shall be of no effect, unless it is proved to

have been beneficial to her. *No queda obligada, a menos que se prueba haberse convertida la deuda en su provecho.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

King and *Markham*, for the plaintiff.

Todd and *Simon*, for the defendants.

Hodge *v.* Eastin. V, N. S. 57.

FIFTH District.

Evidence may be given that a partner endorsed the note for the firm, although it be not averred that the partnership was a commercial one, nor that the partner had authority to administer its affairs.

Chretien *v.* Her Husband. V, N. S. 60.

The wife is bound to follow her husband wherever he determines to go.

FIFTH District.

MARTIN, J., delivered the opinion of the court.

The wife seeks a separation of bed and board, and of property, on an allegation of being abandoned—she shows she made the summons to her husband, to return to the common dwelling, which he disregarded.

He answers that the wife is bound to reside with her husband in the marital house, which is that he has selected for the residence of himself and his family—that he has removed, as he had a right to do, from the house in which the wife resides, to another in the same parish, where he is and has ever been ready to receive her, but she refuses to come.

He had judgment, and she appealed.

Her counsel urges that the district court erred in concluding that in the present case there is no abandonment, because the wife is bound to follow her husband wherever he chooses to remove his domicil.

Further, that the record contains no evidence of the readiness of the husband to receive the wife in the house in which he now dwells.

The counsel contends that the law has given the wife the power of suing for separation, in case of abandonment, Civil Code, 139, which is inconsistent with the obligation of the wife to follow her husband wherever he chooes to reside.

The case of abandonment of which the Code speaks, is that where the husband abandons the wife, and wanders about without a fixed domicil. Many circumstances may imperiously require the removal of the family from one part of the state to the other. Of the wants of the family, and the means of supplying them, and the place of its residence, the husband is the best judge, and wherever he chooses to go, the wife must certainly follow him. If she remains behind, he, and not she, may complain of abandonment.

The husband, in this case, has attested his readiness to receive the wife at his present place of abode. This it is his duty to do; and the wife, if she expects any advantage from his refusal, ought to have shown it. It is a positive fact, of which the defendant could not be required to administer negative proof.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Robin, for the plaintiff.

Simon, for the defendant.

Sanders *v.* Harding's Heirs. V, N. S. 62.

FIFTH District.

The net proceeds of an estate, are the amount of the inventory, after deducting the debts of insolvent debtors, articles which prove of no value, and its passive debts.

Duralde's Heirs *v.* Guidry. V, N. S. 65.

FIFTH District.

The certificate of the notary, that he notified the endorser by express, although read without opposition, does not establish a legal notice.

Castille *v.* Dumartrait. V, N. S. 69.

COURT of Probates of St. Martin's.

The petition may be amended by praying for the restitution of the property, instead of the payment of its value. This not being an altering of the substance of the demand under Code of Practice, 419.

Fusilier *v.* Hennen. V, N. S. 71.

FIFTH District.

This case similar to, and ruled by Kling *v.* Fisk, 4 *N. S.* 391.

Abat *v.* Sigura. V, N. S. 73.

FIFTH District.

If the endorser of a note plead the general issue, want of notice and fraud, his counsel has not the right of opening the case to the jury.

On plaintiff was the burthen of proof as to notice of protest, and whenever plaintiff has the affirmative in any one of the issues, he has a right to open and close the argument.

Rees *v.* Dejean. V, N. S. 76.

FIFTH District.

Interest on a twelve-months' bond is to be paid at the rate of ten per cent. if by the judgment the debtor was to be charged at that rate till payment. See Acts of 1817, p. 134.

Perry *v.* Believre. V, N. S. 78.

FIFTH District.

Plaintiff describing himself as "of the kingdom of France," gives himself a sufficient domicil.

Foster *v.* Murphy. V, N. S. 79.

FIFTH District.

In this case the Court said:—The present case, although differing somewhat in print of facts and circumstances, is not distinguishable as to principle, from several cases lately decided by this court; particularly the cases of Abat *v.* Casteres, and Tabor *v.* Johnston *et al.*, reported in 3 *N. S.* 220 and 674.

If indeed there be any difference, it is such as to make the case now under consideration, stronger against the plaintiff. The property was sold under execution on a twelve-months' bond, in which the present plaintiff was bound as surety with the defendant in execution, who became the purchaser under the original execution, and who it seems never ceased to be proprietor until the sale on the bond. He alone could interfere to disturb the appellee in his right and possession, acquired in pursuance of the sale by the sheriff, which would certainly be a vain act on his part, as the property would immediately be subjected to seizure on the judgment, which would still remain in force against him. It is, however, settled by the cases cited, that a purchaser by sheriff's sale cannot refuse to pay the price by him bid for the property, unless he be actually evicted from the same, by some legal process.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and it is further ordered, that judgment be here entered for the defendant and appellant, with costs in both courts.

Baker, for the plaintiff.

Lesassier and *Bowen*, for the defendant.

Broussard *v.* His Creditors. V, N. S. 82.

FIFTH District.

After the process-verbal of the meeting of the creditors of an insolvent is closed, the notary cannot, on a subsequent day, receive the votes of creditors who did not meet.

Irwin *v.* Robb. V, N. S. 84.

FIFTH District.

An appeal brought up without a statement of facts, bill of exceptions, &c., so that the proceedings in the inferior court cannot be examined, is ever considered as a frivolous one.

Gadnigo *v.* P. & I. Roques. V, N. S. 85.

FIFTH District.

On an appeal from the dissolution of an injunction, alleged errors in the proceedings anterior to the original judgment, cannot be examined.

Provost and Wife *v.* Greig *et al.* V, N. S. 87.

FIFTH District.

The defendant in execution, who has enjoined several executions at the suit of different plaintiffs, in the hands of the sheriff, each for a sum less than 300 dollars, cannot give the Supreme Court jurisdiction of an appeal from a judgment dissolving the injunction.

WESTERN DISTRICT, OCTOBER TERM, 1826.

Postlethwaite *v.* Hunt *et al.* V, N. S. 89.

SEVENTH District.

Appeal dismissed for want of a statement of facts, &c., whereby the case might be reviewed.

Prudhomme *v.* Murphy. V, N. S. 90.

SIXTH District.

Where a *certiorari* has been granted to obtain the judge's certificate, due diligence must be used to have it returned, or the appeal will be dismissed.

Pavie *v.* Noyrel. V, N. S. 92.

The omission to charge an item in an account that is shown to be justly due, does not prevent a subsequent demand for it.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The plaintiff and defendant entered into partnership, and agreed to put in an equal capital: after the dissolution of the firm, the former set up a claim for interest on moneys advanced by him above the amount of stock he was obliged to furnish, and also for his expenses while attending to the affairs of the firm in New Orleans.

To a petition setting forth these facts, and claiming the sum of five thousand dollars, the defendant pleaded:

1. That the residence of the plaintiff in New Orleans was not beneficial to the firm.

2. That different accounts had been settled with the plaintiff, in which no such claims were set up as these advanced in the petition; that a final settlement had taken place between them, and that the plaintiff has received his portion of the partnership property.

3. That the plaintiff had injured the partnership by his neglect, and bad management of the common affairs, to the amount of 5000 dollars.

4. That the plaintiff has been credited twice for the sum of 428 dollars 92 cents.

5. That he had occupied himself during the partnership with business other than that of the firm, by which he had gained 3000 dollars, one half of which he should account for.

The answer concludes with a prayer in reconvention, and prays that there may be judgment against the plaintiff.

The answer was submitted to a jury who found a verdict against the defendant for 1566 dollars 50 cents; from the judgment rendered in conformity therewith he has appealed.

The counsel have argued the question whether interest could be properly charged on advances made by one partner, for the benefit of the firm: but the finding of the jury renders it unnecessary for us to go into that question, as the amount claimed for the expenses during the time the plaintiff was transacting the common affairs in New Orleans, justifies the verdict.

It has also been contended, that, as several accounts current passed between the parties, in which no mention is made of this item, the appellee was estopped from claiming it in this suit. But if the

demand be legal and just, it is our opinion that the silence of the plaintiff respecting it, or his omission to put it into the account, can not prevent him from recovering this. It was an error which should not prejudice his rights. In the case of Girod *v.* The Mayor, &c., cited by defendant's counsel, there were many circumstances which this does not exhibit; repeated receipts given by the plaintiff, forced upon the court the conclusion that his subsequent claim for salary was inconsistent with the agreement which though not expressed, was well understood between the parties. 4 *Martin*, 706.

The defendant however insists, that even admitting the verdict of the jury to be correct, in relation to the expense incurred by the plaintiff, while transacting the partnership affairs, there is an evident error in not allowing the defendant credit, for a sum which in the account current was twice charged by the plaintiff. It is impossible for the court to say where so many facts were put at issue, and so many different considerations submitted to the jury, whether they allowed this sum or not. Under these circumstances, we feel unwilling to disturb the verdict. The point is precisely that made in the case of Richardson *v.* Debuys & Longer, and must receive a similar decision. 4 *N. S.* 132.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Bullard, for the plaintiff.

Rost, for the defendant.

Fredeau *v.* Grillet. V, N. S. 95.

SIXTH District.

Verdict of the jury ordinarily sustained when not turning on any point of law.

Hesser *v.* Black *et al.* V, N. S. 96.

A deed cannot be set aside as fraudulent by a creditor who becomes such after the date of the alienation, unless it be proved it was made with an intention to defraud future creditors.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This action is brought to recover possession of a tract of land from the defendants, who set up title to it under a sale made by the sheriff of the parish of Natchitoches, in the year 1825. This sale purports to be made under a judgment rendered against the father of the plaintiff.

The answer avers that the conveyances under which the plaintiff claims are fraudulent and void.

It appears in evidence, that the father sold to one Poissat, in the year 1808; and that the deed from Poissat to the plaintiff, is dated the 30th October, 1820. The judgment under which the defendants claim was rendered in 1817.

We have been in the habit of giving great weight to the decisions of the court below on questions of this kind. But in the present instance we are unable to see any evidence on which the judge *a quo* sustained the defence. The error into which he fell, most probably arose from considering this as an ordinary case where creditors attack an act made in fraud of their rights. The proof adduced, shows, however, that the plaintiff, in execution, did not become creditor until years after the date of this conveyance from the plaintiff's father, which is alleged to be fraudulent. Under such circumstances our law only gave an action, when it was proved that at the time of the alienation the party alienating had the intention to defrand the future creditor. The great difficulty of furnishing this proof, in practice, made the Spanish jurisprudence very nearly the same as the Roman, where the rule was, that subsequent creditors could not revoke alienations made previous to their contracting with their debtors, unless the money lent went to pay the old creditors, in which case it was held the new ones might exercise their rights. The amendments lately made to the Civil Code, contain a positive provision, that creditors cannot annul a contract made before the time their debt accrues. *ff. quæ in fraud. cred. lib.* 10, *sect.* 1, *law* 15 *and* 16; *Curia Phillip. lib.* 2, *cap.* 13, *verbo Revocatoria no.* 12; Louisiana Code, 1988. See also the case of Sides *v.* M'Cullough, 7 *Martin*, 655.

It is, therefore, ordered, adjudged and decreed that the judgment

of the district court be annulled, avoided and reversed, and that the plaintiff do recover of the defendants the premises mentioned in the petition, with costs in both courts.

Bullard, for the plaintiff.

Morris, for the defendants.

Heirs of Rouquier *v.* Executors of Rouquier.
V, N. S. 98.

Land given by the Spanish government to the husband, did not enter into the community.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The heirs of the wife claim a tract of land in possession of the executors of the husband, on the ground that it made a part of the community of acquests and gains, and that the husband, in his lifetime, sold to them all the property which he had held in community with his wife.

The only question in the case is, whether the tract of land sued for made a part of the community of acquests and gains. It appears clear to us it did not. The title from the Spanish government was, it is true, obtained during coverture, but the concession was in the name of the husband alone, and it has been already decided in the case of De Lemos *v.* Garcia, that lands granted by the king to one of the married parties, did not enter into the community. This opinion has been lately reviewed and confirmed in the case of Frique *v.* Hopkins, where the subject has been gone into at length. 1 *N. S.* 334; 4 *Ibid.* 334.

The plaintiffs have endeavored to distinguish the rights of the parties before us, from those already decided, on the ground that the motive for asking for the land from the government was, that it might benefit the community property. The weight to which this argument is entitled, has been considered in the case last cited, and our opinion fully expressed on it. We are satisfied that it cannot have the influence which the plaintiffs attach to it; and even if it did, the facts of the case do not bring them within the exception contended

for; for the grantee asks for the land, not for the use of the property of the community, but for his own, *ses propres animaux*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Deblieux, for the plaintiffs.

Rost, for the defendants.

William Watson & Co. *v.* Clare, Curator. V, N. S. 100.

SIXTH District.

Where the appellant, without any fault of his, is unable to bring up the case, so that the merits can be examined, the cause will be remanded for a new trial. See Porter *v.* Dugat, 9 *Martin*, 92.

Roman Catholic Church *v.* Miller. V, N. S. 101.

The judge of probates may certify the record at any time after judgment.

A legacy of so much money in a drawer, is only good for the sum found there at the deccase of the testator.

SEVENTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiffs claim 500 dollars, under a legacy of that sum (in the will of the late D. Garcia,) "enclosed in a letter and deposited in my (the testator's) armoir, or clothes press, in a drawer marked No. 2." The curator of the estate refused the demand on the ground of the legacy being a nullity, the money not being found in the drawer at

the death of the testator. The plaintiffs had judgment, and the defendant appealed.

The appellees prayed for a dismissal of the appeal for want of a statement of facts, done in due time. There is no statement of facts, but a certificate of the judge of probates, several months after the judgment, attesting the record contains all the proceedings and evidence adduced on the trial.

We think this suffices: The act of 1820 requires that all the testimony given at the trial of a cause in the court of probates, shall at the time be reduced to writing, to serve as a statement of facts. This being the case, and there appearing depositions of witnesses, we must conclude that all the evidence was reduced to writing. And the transcript of the record duly certified, enables us to examine the merits of the case, and this certificate may be made after the judgment.

It appears that on opening the will, on the day the testator was buried, one hundred and seventy dollars and two cents, only, were found in the drawer marked No. 2, but upwards of seven hundred dollars were found in this and the other drawers.

The plaintiff's legacy is a particular one. The legacy of the property I possess in such a place, is a particular one. 5 *Toullier*, 487 and 514. And the nature of the legacy is not varied because a sum of money is bequeathed. A legacy of one hundred reals, which I have in such a box, is good for so much as the testator has there, up to that sum. 1 *Febrero, cap.* 2, *sect.* 2, *p.* 24. And we have received from Spain a positive legislative provision in this respect. *Part* 6, 9, 18. *Mor. & Cur.* 962.

We think the judge ought to have restrained the legacy to the money found in the designated drawer.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that there be judgment in favor of the plaintiffs for one hundred and seventy dollars and two cents, with interest from the judicial demand, with costs in the court below. The costs of appeal to be paid by the appellee.

Rost and *Johnston*, for the plaintiff.

Fennesey, for the defendant.

Burk *v.* Williamson. V, N. S. 104.

SIXTH District.
Appeal dismissed for want of a statement of facts.

Sprigg *v.* Wells. V, N. S. 104.

A judgment is not final until signed by the judge.

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

In this suit the plaintiff claims a lien or privilege on property, in the hands of a third possessor, resulting from a judicial mortgage. His claim being sustained by the judgment of the court below, the defendant appealed.

The only question presented by the case to be solved, arises out of the construction or interpretation of the law relative to the recording of judgments. To give such recording or registering the effect of a mortgage, (from the date of the judgment,) it is required, that it be made within ten days from the time at which such judgment may have been rendered. See 1 *Martin*, 701 and 704. In the present case the evidence shows, that the judgment was entered on the minutes of the court by the clerk, on the 9th of June, 1823, and signed by the judge on the 21st of the same month, and on this latter day was recorded in the office of the parish judge. The counsel for the appellant contends, that this is not a registry made conformably to the provisions of the law above cited; because the recording should have taken place within ten days from the day when the entry was made on the minutes of the court, viz: on the 9th of June. We are, however, of a different opinion.

The law requires the judges of the inferior courts of the state, to sign their judgments within three days after they have been pro-

nounced or rendered: the signature of the judge, according to this regulation is essential to the perfection of a judgment; and although it should not receive such signature until after three days, it does not acquire the force of a judgment, until completed and perfected by the name of the judge thereto subscribed. A judgment is not final until signed by the judge: at least it is not so in all respects, even admitting it to be entitled to that appellation, as distinguished from interlocutory orders. The law contemplates the recording of a final judgment, and that on which the present claim of mortgage is based, was recorded on the very day on which it became complete and final.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas, for the plaintiff.

Scott, for the defendant.

Downs *v.* Kemper. V, N. S. 106.

SIXTH District.

Damages allowed for a frivolous appeal.

Martin *v.* Martin. V, N. S. 107.

SIXTH District.

Decided, that although this court has decided in the case of Bloodworth *v.* Sompeyrac, 3 *Martin*, 709, that by the practice of the courts under the territorial government, the style of the state was not necessary to a citation in a civil suit, yet, as the form of citation in appeals is now established by law, and as, according to the constitution, all process must issue in the name of the state, a citation not having this caption will be treated as imperfect, and the appeal dismissed.

Hooter's Heirs *v.* Tippet. V, N. S. 109.

SIXTH District.

In a suit for land where the pretensions of parties are equal in law and equity, he who is in possession will prevail.

Douglas *et al.* *v.* Curtis. V, N. S. 112.

When judgment is given against a defendant in a representative capacity, but this fact is not mentioned in it, recording the judgment will not give a lien on the property of the principal.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The plaintiffs after the death of John Curtis, sued his widow for a sum of money due to them, and obtained judgment which they had duly recorded. In the petition on which this judgment was rendered, they state that since the execution of the note Curtis had deceased, leaving a widow, Nancy Curtis, who had taken upon herself the administration of the estate, and who had accepted of the said succession, which is more than sufficient to pay the debts, in her capacity of widow, and as natural tutrix to her minor children, heirs of the said John Curtis.

The answer was put in, in her individual capacity, and the judgment condemns her in the same character.

In the petition filed in this cause, the petitioners state, that by virtue of this judgment which was duly rendered, they had obtained a mortgage "on all the real estate then in the possession of the widow, as well such as she held in her own right, as that held as widow and natural tutrix, belonging to the succession of her husband, the late John Curtis, having accepted the succession purely and simply, and having made herself liable for the payment of all the debts of the com-

munity, and held the said estate in the same manner in which it was at the death of the husband."

They proceed to state that at the time the said judgment was rendered and recorded, and for some time thereafter, the said widow held a number of slaves belonging to the succession of the said John Curtis, upon which the judgment operated as a lien or mortgage: that several of them had come into the possession of the defendant in this suit, who refuses either to pay the debt, or surrender the property to be sold. They conclude by praying that the slaves may be sold.

The defendant pleads, first, the general issue: secondly, that the plaintiffs had a special mortgage on sundry slaves, of which John Curtis had seized, and which, after his death, were sold at probate sale for an amount more than sufficient to pay the plaintiff's demand, and which they are obliged to discuss: thirdly, that he holds the negroes, mentioned in the plaintiffs' petition, under a *bona fide* sale from the sheriff, acting in his official character, for a valuable consideration, who, at the time of sale, produced a certificate from the parish judge, that the slaves were free from mortgage.

The court of the first instance gave judgment for the defendant, and the plaintiffs appealed.

Nothing in evidence, as it appears on record, sustains the plea of discussion. The facts alleged in the petition are supported by proof; and the only questions which the case presents are those of law.

The first ground of defence assumed by the defendant, is, that the judgment as recorded in the office of the register of mortgages for the parish of Rapides, gave no mortgage on the property on which the plaintiffs now seek to make it attach. The judgment is in the following words: "Douglass and Cage *v.* Nancy Curtis. By reason of the law, and evidence being in favor of the plaintiffs, it is ordered and adjudged, that they recover from the defendant the sum of two thousand and fifty dollars, with five per cent. interest per annum from the 1st March last until paid, and costs of suit to be taxed. May 27, 1820.

(Signed) WM. MURRAY, *Judge 6th District.*"

The property which the plaintiffs pray may be seized and sold to satisfy this judgment, is stated in the petition to have belonged to the succession of John Curtis, and the question therefore is, whether a judgment recorded against Nancy Curtis, operated as a mortgage on the property of the succession of John Curtis.

On the first view of this question, it appears extremely clear, and there is scarcely any legal mind to which it was proposed, that would not at once answer it in the negative. But the solution becomes more difficult when we recur to the pleadings of the case in which this judgment was rendered.

By them we find that the defendant, Nancy Curtis, was sued on an obligation made by her deceased husband, John Curtis. In the petition it is stated that she had taken on herself the administration of his estate: that in her capacity of widow, and as natural tutrix to her

minor children, she had been requested to pay the said debt which she had refused to do; judgment was therefore prayed against her for the amount of the obligation.

In consequence of these averments the plaintiffs contend, that the defendant was sued as representative of the estate of her deceased husband—that although the judgment makes no mention of the fact, yet, as it is general in its terms, it must be understood to follow the obligation it enforces: that it was, therefore, in fact, a judgment against the estate; and that if the property now sued for, would have been liable to be seized in satisfaction of it, in the hands of the defendant, it must be equally so in the hands of those into whose possession it has passed. United States *v.* Hawkins, 4 *N. S.* 317; Baudin *v.* Dubourg & Baudin, *Ibid.* 496.

This reasoning is certainly specious, but it is not sound. The proposition that the judgment must have the same force against the property of the defendant, purchased by third persons, that it would have had on that property, if it had remained in his possession, is only true, where it has been registered according to law, and in such terms as will give notice to third parties of the lien that exists on it.

This position will appear true on the slightest reflection. The object of registry laws, is the protection of good faith in those who, after the rendering of the judgment, may wish to purchase the property of defendant, or find it necessary to acquire liens on it. Now if the language in which the recorded judgment is drawn up, does not indicate the person really condemned by it, but that fact can only be ascertained by considering the judgment in reference to the pleadings, it is evident that enregistering the judgment without the pleadings, gives no notice to the world, of the party whose property is affected by it. In the instance before us, the judgment would not have authorised an execution against the estate of John Curtis, unless taken in connection with the allegations in the petition; and if it would not have authorised an execution, it cannot be considered as operating as notice to third parties, when recorded in another office. Persons looking there would have found nothing to inform them that there existed any lien on the property of the real defendant: nor any thing which even could have excited suspicion, or put them on inquiry; for a judgment rendered against A affords no intimation, that if a further search is made in another place, it will be discovered that the judgment is against B. And even if it had, we are not prepared to say it was the duty of a third purchaser to look beyond the office of mortgages, that being the place where the law requires explicit notice should be given. But as the record here contained nothing to put the defendant on inquiry, that point need not be settled.

If it were held that purchasers were bound by judgments, registered as that now before us, then, on the same principle, the recorder of mortgages, who would certify according to the record in his office, would be liable to them, on an action, for the injury suffered through his error. To this action it would certainly be a good defence, that

the judgment rendered gave him no information to the contrary. And it would not be a good answer to this defence, that if he had gone to the court where the judgment was recorded, and examined the pleadings, he would have ascertained that this decree was against a party in a representative capacity, and not in a personal. The law imposes no obligation on him to examine in the offices where the copy of the judgment can be found. It is sufficient for him to record it as presented, and he cannot be considered to err in not knowing that the mortgage was on property other than that which it purported to be. If the plaintiff had intended that the judgment should be rendered, and operate as a mortgage on the property of the deceased, the decree should have been expressed against the defendant as representative of the estate of John Curtis.

This opinion renders it unnecessary to examine the other questions raised in the cause, and it is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Baldwin, for the plaintiffs.

Thomas, for the defendant.

Wells *v.* Hunter, V, N. S. 119.

When a judgment dissolving an injunction is given on a plea to the merits, it forms *res judicata* on the matters at issue.

Writing is not of the essence of a contract but the evidence of it.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff obtained an injunction against the defendant, to prevent the levy of an execution against a third person on a slave, part of the property of the plaintiff's ancestor; the injunction was dissolved on the plea of the general issue, the district court being of opinion that the law and evidence were in favor of the defendant.

The plaintiff even procured a deed of sale from M'Laughlin, to himself and his coheirs, stating the slave had been purchased and paid for by their ancestor. On this an injunction was obtained, and the defendant pleaded the general issue, and the *res judicata*, by the former suit. The injunction was dissolved and the plaintiff appealed.

It is objected here on his part, that the dissolution of an injunction

is not a judgment which forms a *res judicata*, and that the title given by M'Laughlin, since the dissolution of the first injunction, cannot be said to have been acted on.

A judgment dissolving an injunction is very often as one of non-suit, and form then no *res judicata*, but here the dissolution took place after a plea of the general issue, and the evidence was held to be in favor of the defendants.

The deed of M'Laughlin, obtained since the dissolution of the first injunction, is only an evidence of the contract by which the plaintiff's ancestor acquired a title to the slave; and the latter is in the hands of the heirs as assets of their ancestor's estate.

A contract is to be considered abstractedly, free from its form, the instrument which is the evidence of it; the one is the nut, the other the kernel. The writing is resorted to, in order to perpetuate the remembrance of the contract, but it is not of its essence. *Fiunt scripturæ, ut quod actum est, per eas faciliter probari poterit, et sine his autem valet quod actum est, si habeat probationem. L. 4, ff. de pign.* 20, 1.

The Civil Code, 310, art. 241, requires every covenant, tending to dispose of a slave, to be written. But it does not avoid a covenant merely oral: since it provides, that if the covenant be denied, its existence shall not be proved by parol: a negative pregnant with the affirmative, that it may, by the admission of the party in the pleadings in his judicial confession.

Thus also the Code 344, art. 2, requires all sales of slaves to be written, and declares oral ones null. But the immediate provision that no parol proof shall be received of an oral sale, and the preceding clause just commented on, show that the nullity is not an absolute one, but a qualified one, in case no other proof be offered but by parol.

This construction gives effect to every word used by the legislature, and therefore is the soundest. It gives effect also to the contracts of men when admitted or duly proved, *ut res magis valeat quam pereat.*

We conclude that the effect of the *res judicata* on the alleged title, cannot be avoided by the acquisition of new evidence in support of it, obtained since the present judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Scott, for the plaintiff.

Thomas, for the defendant.

Clark *v.* Wright. V, N. S. 122.

A creditor who is not put on the *bilan*, is not bound by the proceedings.

When a negotiable note is the evidence of the debt, it is the duty of the insolvent to find out the endorsee; putting the debt in the schedule in the name of the payee is not sufficient.

The orders generally granted on insolvent petitions, are erroneous—they should only direct stay of proceedings on the part of those creditors who are placed on the bilan.

A sheriff who neglects to arrest a defendant, at the suit of a creditor who is not placed on the bilan, is responsible in damages—but they will be only nominal.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This is an action against a sheriff for failing to arrest a defendant on a writ of mesne process. The defence is, that at the time the process came into his hands, the defendant had filed, in the office of the clerk of the court, a petition praying that a meeting of his creditors might be called and he be permitted to surrender his property; and that this petition was accompanied by an order of the judge, staying all proceedings against the person and property of the defendant.

There are no public officers who are placed in more delicate situations than sheriffs. The duties they have to perform frequently require them to decide, at their risk, questions on which perhaps the best legal advice they can resort to, will hesitate to pronounce positively. This case is an illustration of the truth of this remark. The creditor who brought the suit was not put on the *bilan*, though the debt due to him was. He was endorsee of the note, and the insolvent had no notice of the transfer. It has only been lately decided in this court, and that after much reflection, for the point was very doubtful, that persons who issue negotiable paper must take the risk, in case of insolvency, of ascertaining the *bona fide* holder; and that their neglect in doing so, was not cured by placing the debt on their schedule in the name of the payee. Herring *v.* Levy, 4 *N. S.* 383.

The terms in which the orders on insolvents' petitions are drawn up by the judges of the first instance, though sanctioned by long usage, are not so precise and correct as could be desired. They, almost universally, direct that all proceedings be stayed against his person and property, though, as it is well known, they do not operate as a stay of all proceedings, but only the proceedings of those who may be placed on the bilan. It would be much better if they would direct, that all proceedings against the person of the insolvent, by the creditors placed on the schedule, should be stayed. Had that been done here,

the action would, most probably, not have been heard of. The apparent inconsistency, however, between the words of the order and its real effect cannot avail the defendant. It was his duty to know the law, and that the stay of proceedings could only have effect against those whose names were on the bilan.

But the question remains, to what extent is the officer liable? The plaintiff, by his petition, seems to have understood that because the arrest was not made, he had a right to demand the whole amount of the debt from the sheriff. But we understand the law to be, that if the sheriff permits an escape on *mesne* process, his responsibility is limited to the loss actually sustained by the plaintiff. Now in the case before us it was, and could have been, but nominal, for the plaintiff might have been compelled to join in the *concurso*. It has already been settled in this court that if the insolvent be sued by a creditor, not on the bilan, his suit will be cumulated with the proceedings which the insolvent has commenced. In this case the debtor must have been discharged on application to the judge; the failure to arrest him, therefore, worked no injury to the petitioner, and he is only entitled to nominal damages for the mistake which the defendant committed. Franklin Bank *v.* Nolte *et al.*, 4 *N. S.* 624; 10 *Martin*, 687; 5 *Ibid.* 196.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the plaintiff do recover of the defendant the sum of one dollar, with costs in both courts.

Oakley and *January*, for the plaintiff.

Thomas and *Boyce*, for the defendant.

Havard *v.* Stone. V, N. S. 126.

The execution of a judgment cannot be enjoined, until a claim of the defendant sounding in damages be examined.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The defendant, a resident of Mississippi, obtained judgment against the plaintiff and was proceeding to carry it into execution, when the latter took out an attachment which he had levied on the debt due

by himself, and then sued out a writ of injunction to prevent the defendant enforcing his judgment.

This attachment however, was superseded, by the defendant giving bond under the statute, to respond to any judgment which the plaintiff might obtain against him. On this fact being shown, the judge *a quo* dissolved the injunction, and the plaintiff appealed.

The only error which the judge below committed was, in granting the injunction on the showing of the plaintiff in his petition. The claim was one sounding in damages for selling to him a diseased slave in another state of the Union. The plaintiff in the original suit could not be delayed in the execution of his judgment until this demand was ascertained. It is only when the debt due is liquidated, or susceptible of immediate liquidation, that the defendant can offer it in compensation of an execution: the time given by the Spanish law is ten days. See the case of Caldwell *v.* Davies, 2 *N. S.* 135, where this subject is examined at length.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Oakley, for the plaintiff.

Bullard and *Wilson*, for the defendant.

Pleasants *v.* Botts. V, N. S. 127.

SIXTH District.

An appeal will not be dismissed because the appeal bond is given to B and A, instead of A and B.

Criswell *v.* Gaster *et al.* V, N. S. 129.

Money paid on a horse race which was simulated and fraudulent, may be recovered back.

And in an action for that purpose, it is not a good objection to the competency of a witness that he was also a better on the race.

SEVENTH District.

MATHEWS, J., delivered the opinion of the court.

In this suit the plaintiff claims damages on account of a fraud practised on him in a horse race. He alleges in his petition that the defendants entered into a simulated and fraudulent contract to run a race between two horses, the relative speed of which had been previously ascertained, with a view of cheating and defrauding other persons who might be induced to bet on said race; that he did wager the sum of 320 dollars, with one of the original parties to the simulated agreement above stated, which was determined by the judges of the race to be lost, and was accordingly paid, and which he seeks to recover back in the present action, and also an equal sum which might have been won by him, if the race had been fairly run.

The cause was submitted to a jury in the court below, who, from their verdict, appear to have been fully convinced of the fraud alleged, and assessed damages in favor of the plaintiff to the amount, not only of the sum by him wrongfully paid, but also for that which he might have gained. Judgment being rendered in pursuance of the verdict, the defendants appealed. A bill of exceptions is found on the record to the competency of a witness who was also a better on the race, to a small amount, on the same side with the plaintiff. The judge *a quo* considered this as a circumstance which might affect his credit, but was not sufficient to render him incompetent. In this opinion we concur with the court below. A motion was made for a new trial, which was overruled. All the facts of the case coming up to this court, that proceeding in the cause need not be noticed.

As to the merits of the case, we think the jury erred in giving a verdict for more than the sum actually paid by the plaintiff. The judgment of the district court being in conformity thereto, is also erroneous. The aleatory contract was clearly simulated and feigned, and although intended to defraud, it could legally produce no effect; nothing could have been lost on it, and consequently nothing could be won. It might, perhaps, be assimilated to what, in jockey phrase, is called a drawn race, such as happens where the parties consent to

annul their agreement to run, or when the horses prove to be of equal speed. It is true that the conduct of the defendants appears to have been immoral in the extreme, (if morality may be considered to have place in any shape in quarter races:) but as the contract must be considered as void *ab initio*, the plaintiff is only entitled to recover back the money by him paid without consideration and in error.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed: and it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendants, the sum of 320 dollars, and that the appellee pay the costs of this appeal.

Thomas, for the plaintiff.

Scott, for the defendants.

Buard v. Buard's Heirs. V, N. S. 132.

SIXTH District.

The party who calls a witness, and examines him in chief, can not afterwards object to his competency.

Compensation may be pleaded in case of insolvency, when the credit accrues before bankruptcy, and is unattended with suspicious circumstances. See 7 *Toullier*, p. 454 to 458.

Stafford *v.* Stafford. V, N. S. 136.

The court of probates has jurisdiction of applications for the interdiction of insane persons.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

This action was instituted to obtain an interdiction for insanity, in the parish court. It supported a plea to its jurisdiction, and its judgment was affirmed in the district court and the plaintiff has appealed to this.

We are of opinion the case is cognisable in the court of probates. It is true that the Civil Code, 78, art. 5, declares that every interdiction shall be pronounced by the judge of the parish of the domicil or residence of the person to be interdicted. This judge is to appoint an administrator to protect the estate until judgment, and afterwards a curator.

The object of the legislature, here, was to define the parish in which the interdiction was to be provoked. The judge of that parish, in his capacity of judge of probates, appoints curators of vacant estates, absent heirs, minors and other persons. Act of 1826, p. 92.

The insanity which renders necessary the appointment of a curator, ought therefore to be ascertained by the judge of the parish in that capacity in which he is to oversee the administration of the estate of the insane person, by a curator. It is, therefore, in his capacity, of judge of probates, that he ought to be applied to, to pronounce the interdiction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Baldwin and *Bullard*, for the plaintiff.

Boyce and *Thomas*, for the defendant.

Clay *v.* Oakley. V, N. S. 137.

In an action against an agent for endorsing a note without authority, proof must be given of notice of protest to him or to the principal.

Depositing the notice in a post-office is not sufficient if the endorser lives in the place where the post-office is situate. And if he lives out of the place, the notice is bad if directed to him as living in it.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff seeks to make the defendant liable, on his endorsement as agent of Bynum, because the endorsement was made without authority. The want of authority rendered the defendant liable, as if he had endorsed the note as his own. His liability in such a case would have been dependent on the use of legal diligence on the part of the endorser, by demand, protest and notice. It becomes, therefore, the plaintiff in this case, to show that he used this legal diligence. It is clear the defendant, as he endorsed in the name of Bynum, cannot complain that notice was given to the latter and not to himself; for if the plaintiff erred in considering Bynum as his endorser, the error proceeded from the act of the defendant; but if the endorsee gave no legal notice to any one, he cannot blame any one but himself, if by his laches, his endorser, whoever he was, was discharged.

We, therefore, conclude, that it behooves the plaintiff, who sued as endorser, to show that he did not discharge his endorser, but used legal diligence.

The record shows that notice of the protest and non payment was deposited in the post-office at Alexandria, directed to F. A. Bynum, at that place. Now Bynum dwelt either within or without that town: if he did without, the notice was not properly directed, and the plaintiff must fail. If Bynum resided in Alexandria, he was entitled to notice at his domicil, and nothing authorised its being left in any other house.* It is therefore clear, no legal notice was given, and the endorser of the note was thereby discharged.

The plaintiff is, therefore, without a right of action against the

* By act of March 13, 1827, notices are permitted to be put "into the nearest post-office to the spot where the protest is made," addressed to the proper party at his usual place of residence: First, When such party does not reside in the town where the protest was made. Secondly, When his residence cannot be ascertained after due diligence, and then to be addressed to the place where the bill was drawn.

defendant, for whether the latter correctly endorsed the note in Bynum's name, or improperly being without authority, the plaintiff suffers from his own negligence only.

Had notice been given to Bynum or the defendant, perhaps they might have taken such means, as might have led to payment by the maker of the note: the plaintiff by neglecting to give notice, took upon himself the risk of obtainig payment from the maker.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant as in case of nonsuit, with costs in both courts.

Thomas, for the plaintiff.

Oakley and *January*, for the defendant.

Cox v. Williams. IV, N. S. 139.

An attorney may be called on by his client's adversary, to testify in the cause in which he is employed.

A payee and endorser of a note is a good witness to prove that he acted as agent for another in taking the note payable to himself.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The defendant is sued on his promissory note, which has been endorsed by the payee, to the plaintiff. The answer contains an averment, that the note was given on a consideration which has failed: and that this defence may be well set up against the petitioner, because the payee was his agent, and took the note for his use and benefit.

In support of these allegations, the defendant offered at the trial, the payee, as a witness. He was objected to on two grounds; first, because he had been employed by the plaintiff as his attorney in this suit; and secondly, because he was endorser. The judge held the first objection to be a good one, and rejected him, to which opinion the defendant excepted.

I. The contemporaneous construction of the statute, which directs that attorneys shall not give evidence in any case in which they have been employed, was, that attorneys were placed under the same disabi-

lities as parties. The motives which induced the legislature to pass such a law were supposed to be, that attorneys could not be safely intrusted to testify for their clients: that under the influence of professional zeal they became in feeling, if not in interest, completely identified with those who employed them. It is not within our experience, that this law has ever been considered, to prevent one of the parties from calling for the testimony of his adversary's attorney. There can be no reason supposed why it should. On the contrary there are powerful considerations, flowing from a regard to an efficient administration of justice, why it should not. For in this way, the witness on whose knowledge the whole fortune of one of our citizens depended, might be disqualified by the act of the person against whom he was to testify. This is permitted by no system of laws that we have any acquaintance with. Nor can we believe, the legislature contemplated conferring any such power. When the terms in which a law is drawn up, lead us by a strict interpretation, to consequences contrary to common sense, and destructive of private right, it is our duty to construe them in such a way as will avoid these consequences. The will of the legislature is certainly to be obeyed, but the literal meaning of the words used, is only one way of ascertaining it. It must be sought also in the whole context, in the object of the law, in the evil to be remedied, and above all in the conviction sincerely entertained by this court, that the representatives of the people do not intend to violate first principles. If a party to a suit, could by any act deprive his adversary of his witness, he could on the same principle seize on his documentary evidence and retain it; and if the legislature could be supposed to have the intention to authorise such things, they might be supposed capable of enacting that the debtor should be discharged from his obligation; for we can not see the difference between depriving a man of his property and depriving him of the evidence which establishes his right to it.

II. Nor do we think the circumstance of the witness being an endorser on the note, deprived the maker of his testimony. The rule relied on in support of the objection, is of modern date and not yet perfectly settled. Admitting it however in its whole extent, it does not reach this case, for the defendant did not introduce the witness to prove any thing by which an innocent endorsee could be injured, but to establish that the person by whom the suit is brought was in truth the payee, and the witness his agent. If such were the facts of the case, there could be no question about what an endorser could prove, for the suit, though in the name of the endorsee, would really be one between the maker and payee, and as between them the consideration might be inquired into.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be remanded to the district court, with direction to the judge not to reject the payee and endorser of the note as a witness to prove that he acted as agent

of the plaintiff, and that the note was given to him in that capacity. It is further ordered that the appellee pay the costs of this appeal.

Baldwin, for the plaintiff.

Wilson, Scott, Bullard and *Oakley*, for the defendant.

Strong *v.* Morgan. V, N. S. 144.

SEVENTH District.

A synallagmatic contract, though not made double, is good as a commencement of proof in writing. See Ferguson *et al. v.* Thomas *et al.*, 3 *N. S.* 75.

Stafford *v.* Stafford. V, N. S. 145.

SIXTH District.

The defendant cannot resist the plaintiff's claim, for his, the plaintiff's negro, and the hire, on the ground that there was no demand.

Wells's Heirs *v.* Baldwin. V, N. S. 146.

The purchaser of real estate by public act, cannot be affected by a previous alienation *sous seing privé*, which was not accepted by the person in whose favor it was made.

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiffs claim an undivided fifth part of a certain tract of land described in their petition. Judgment was rendered against them in the court below, from which they appealed.

The evidence which was offered in support of their title, as it appears on record, is testimonial proof of the contents of an act passed before E. Meuillon, by which it appears that Miller and Fulton, under whom both parties to this suit claim title to the premises in dispute, acknowledged and agreed, that although they purchased the land in their individual names, it was bought for themselves and three other persons, one of whom is the ancestor of the appellants.

There is some contradiction in the testimony as to the manner in which the instrument from Miller and Fulton, to the ancestor of the plaintiffs, was executed: the weight of evidence, however, shows that it was not signed or accepted by any of the persons for whose benefit it was made.

There is a bill of exceptions to the admissibility of oral testimony to prove the contents of the written deed, which appears to have been lost or destroyed. Whether the loss wss proved in such a manner as to authorise the introduction of testimony to prove its contents, need not be inquired into, because the act appears never to have been perfected by the acceptance or signature of the pretended partners of the purchasers, Miller and Fulton, in whom the whole legal title remained until they sold, conveyed and delivered the land to the defendants, who are vendees from them without notice of any former sale or transfer to any other persons: for the pretended transfer to the ancestor of the plaintiffs was no where to be found on record. Giving to the evidence of title, on the part of the appellants, the utmost force that a complete *sous seing privé* deed could have, (and the act under which they claim is clearly entitled to no higher dignity, as it does not appear even to have been placed on the records of a notary or any other officer,) it could not avail them against the appellees, who, although they should be considered as second purchasers, are the first to whom tradition was made. It is, perhaps, true, that being represented as a copy of a deed passed before a commandant of the Spanish

government, a violent presumption is raised that it was made in authentic form and that the original remained on record in the archives of that officer; but it is clear, from the whole evidence and all the circumstances of this case, that the original could not be found, or any record of it, at the time when the defendants purchased from Miller and Fulton. In relation to these purchasers, it ought to have no further effect than an act under private signature. On a full view of the entire case we are of opinion that the appellants have shown no title to the land in dispute, against the appellees.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Scott, for the plaintiffs.

Baldwin, for the defendant.

Parkins *et al. v.* Campbell *et al.* V, N. S. 149.

When a debt is due at several instalments, and the transferee of the second causes the property to be seized and sold, the purchaser at the sale cannot be disturbed by an action at the suit of a creditor to whom the first instalment was assigned.

How the proceeds of the sale should be divided.—*Quære.*

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiffs obtained an injunction, by which proceedings on an order of seizure were delayed, wherein the defendants were about to cause to be sold a tract of land claimed by said plaintiffs.

On hearing the cause, the injunction was made perpetual, from which the defendants appealed.

The facts of the case show, that the appellants being indebted to the appellees, transferred to the former a debt, which the latter held on a third person secured by mortgage on the land which they attempted to seize and sell as above stated. The claim transferred was a second instalment of the debt thus secured by mortgage, on which the mortgage property was regularly seized and sold for the benefit of the transferees, was purchased by their agent and the title transferred to them, or one of them. Since this sale the order of seizure, or execution, complained of in the petition for an injunction, issued in favor of the appellants on a previous instalment, which was

secured by the same act of mortgage, and which is perpetually enjoined by the judgment of the district court.

We are of opinion that the judgment thus rendered is correct.

The person in whom the right of the first instalment remained, having taken no steps to enforce their claim, until after the second became due, and the mortgaged property was seized and sold under it, have lost their lien on said property, in the hands of third possessors. The sale under the mortgage destroyed entirely its force, and gave a complete title to the purchaser.

How the proceeds arising from such sale should be divided, or whether they be subject to division and partition between the owners of the different instalments secured by the hypothecation, are questions which do not occur in the present suit.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Baldwin, for the plaintiffs.

Scott, for the defendants.

Southward *et al.* v. Bowie. V, N. S. 151.

SIXTH District.

An attachment may issue to compel the attendance of a witness without an affidavit of his materiality, where the issuing it will not delay the trial of the cause.†

* For the actual provisions on this head, see Code of Practice, art. 686, *et seq.*

† Code of Practice, art. 471, permits attachment against witnesses, as a matter of course, on return that they have been subpœnaed personally, or otherwise constructively served.

Reynolds *v.* Thomas. V, N. S. 152.

Where the motion for a new trial is not shown by the record to have been made before the judgment was signed the cause will not be remanded, because that motion does not appear to have been acted on.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The defendant is sued on his promissory note, which has been endorsed by the payee to the plaintiff. The defence set up was, that the note which, on the face of it, purported to be due at sight, was by an agreement between the payee and the maker, payable several months after; and that the petitioner had notice of this agreement.

The endorser was by an order of the court made a party to the suit, and in answer to an interrogatory propounded to him, he categorically denied that any such agreement had been entered into as that stated in the answer.

On this proof, the judge below necessarily gave judgment for the plaintiff: the defendant appealed.

In this court he has moved to have the cause remanded, on the ground that he made a motion for a new trial, which was not passed on by the judge below, and the district court was adjourned improperly, before that motion could be heard.

Nothing on the record enables us to say there is the least foundation for this application. The judgment which it is alleged was rendered out of court, is shown by the transcript to have been given in open court. The motion for a new trial, does not appear to have been made within the time prescribed by law. The judgment is signed and dated of November term, and the motion is of the 4th of December, we cannot therefore judicially know it was made within the time prescribed by the statute, which regulated our practice antecedent to the passage of the Code. Every legal presumption is against it, for the judgment is signed, and the judge was prohibited from doing so, until the three days had elapsed for making a motion for a new trial. We must presume he did his duty, until the contrary is shown. Acts of 1817, 32, 11.

We are unable to find any grounds to refuse the application of the plaintiff, that the judgment below should be affirmed with damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs, and ten per cent., damages on the amount of said judgment.

Baldwin, for the plaintiff.

Thomas, for the defendant.

Benson *v.* Shipp. V, N. S. 154.

Surrender of an obligation will not produce novation if the evidence shows it was not intended to revive another debt in lieu of it.

SIXTH District.

In this case, the Court say:—The defendant insists, that the surrendering the note is conclusive evidence that the attorney novated the debt, and that although it was not within his powers to do so, yet as the plaintiff has recognised and sanctioned the transaction by bringing suit on the agreement, it is as binding on him as if his agent had possessed full powers in the first instance.

The evidence does not prove a novation; neither the receipt of the attorney, nor the counter letter, signed by the defendant, raises a presumption of it. The attorney states, that he had received the notes from the firm of which the defendant was partner, for collection, and that out of the money received from them, he was to pay the plaintiff. The counter letter declares, that "we have put into the hands of H. A. Bullard certain notes, out of which, when collected, he is to retain 823 dollars for Benson." To constitute novation, one debt must be given for another. In this case, if the plaintiff novated the debt, it must have been for obligations other than those mentioned in the evidence, for they remained the property of the partnership of which the defendant was member, were to be collected for their benefit and at their expense.

Then, as to surrendering the obligation. This in an ordinary case would be sufficient proof that the obligation it evidences was discharged, but the circumstances under which it was delivered here destroy that presumption. It is shown that nothing was received for it. The note was surrendered by the attorney, who was agent for both parties, on the presumption that he would receive enough from the obligations put into his hands for collection, to meet it. But there is no evidence the parties understood it was paid, on the contrary, the counter letter proves that there was a balance due, which was to be paid.

As to the allegation that there was negligence in collecting these debts. This may be so, but the plaintiff is not responsible for it, for the attorney was the agent of the defendant, in making these collections.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Bullard, for the plaintiff.

Thomas, for the defendant.

M'Crummen *v.* M'Crummen *et al.* V, N. S. 158.

A post office is not the proper place to deposit a notice of protest when the endorser lives in the same town or adjoining it.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff sues as endorsee of a promissory note, which was duly protested. The notice was put by the parish judge in the post office at Alexandria, while the endorsee's residence was out of the limits of that town but within a few rods of the boundary.

A post office is a proper place of deposit for notices, that are to be conveyed by mail to some other post office, or perhaps to be left on the road. But when the residence of the endorser is within the town or close on its borders, it is clear that the notice must be given to him there, as his opportunity of receiving it from the post office, is more distant and perhaps more precarious.

The absence of the endorsee from home is not a reason to delay notice till his return, because he is supposed to arrange his affairs in such a manner that they may be attended to while he is abroad.

This case differs very little, indeed not at all from that of Clay *v.* Oakley, lately determined.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Baldwin, for the plaintiff.

Thomas, for the defendants.

* See note on Clay *v.* Oakley, *ante*, 480.

Bynum *v.* Armstrong. V, N. S. 159.

An agreement by which A *sells* cotton to B, on condition that the latter shall take it to another place, sell it, and pay over the proceeds to the creditors of the vender, is not a contract of sale.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The defendant is appellant from the judgment of the district court, which perpetuates an injunction, obtained by the plaintiff to prevent the sale of a quantity of cotton, on which the former had caused a *fieri facias* against F. A. Bynum to be levied.

The plaintiff claims the cotton, as part of the estate of Parham T. Bynum, of which he is curator, as having been purchased by his estate from Francis A. Bynum, according to the following document.

"Articles of agreement made and entered into between Francis A. Bynum and Parham T. Bynum, both of the parish of Rapides, witness, that F. A. B. has bargained, sold and delivered to P. T. B. and by these presents, sells, bargains, transfers and delivers to him, all his crop of cotton, which has been raised on his two plantations, the present year, the greater part of which is gathered, and some of it ginned and baled, and is contained in his gin and cotton house, on his upper plantation."

In consideration of which the said P. T. B. promises and obliges himself to pay to F. A. B. such price as he may obtain for it in New Orleans, after deducting freight and charges of sale: first paying out of the said price a debt due by F. A. B. in two judgments obtained against him by L. R. in the sixth district court for the parish of Rapides, and in the next place paying a claim of W. M. as far as 4000 dollars, against F. A. Bynum, and the balance of the price of said cotton to F. A. Bynum or his order."

The character of a contract is to be sought in the object the parties sought to accomplish, rather than in the appellation they gave it; in what is done, than in the words that are used.

Thus, there is no contract of sale, without a price in money, and if A. sell to B. a horse for a mule, which B. promises to deliver, there is no contract of sale, but one of exchange.

The object of the contract of sale is to make the vendee have the thing sold as his own, to give him a right to, an interest in it.

Here the intestate acquired no right nor interest in the cotton: he was authorised, and undertook to convey it to, and to sell it in New Orleans, and to pay the proceeds to the creditors of the owner and

his order. The cotton was never at the risk of the intestate; had it been destroyed by fire, or sunk in the river, without his fault, the loss must have been his employer's F. A. B. *Res perit domino.*

The intestate incurred no other obligation than to use his best endeavors to convey the cotton to New Orleans, sell it, and pay the price to F. A. B. This did not make the intestate an owner, for the cotton was not at his risk, and he was neither to have any benefit or sustain a loss, in case of a rise or fall in its value. The profits and risks were all F. A. B's, who never ceased to be the owner. The cotton was therefore properly seized as his property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the injunction dissolved, the plaintiff paying costs in both courts.

Scott, for the plaintiff.

Thomas, for the defendant.

Stafford *v.* Stafford. V, N. S. 162.

SIXTH District.

Verdict allowed to stand, not being manifestly erroneous, when no question of law had arisen in the case.

Hunter *v.* Smith. V, N. S. 164.

SIXTH District.

The plaintiff's right to pray a discontinuance of his suit was recognised by this court in the case of Petit *v.* Gillet, 5 *Martin*, 20, and the court have heard nothing since, that militates against it. The court may itself order a dismissal. 3 *Partida*, 22. 3; 22. 9.

Martin *v.* Martin's Heirs *et al.* V, N. S. 165.

When a minor is absent from the state, service of citation in an action of partition may be made on his curator.

And if duly represented in that action, the judgment is conclusive against him until set aside.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This is an action to recover from the heirs and sureties of a curator, the sum of 40,000 dollars, which it is alleged he received for the plaintiff, who was a minor.

The plea of *res judicata* which is offered as a part of the defence set up by the defendants, requires us to set out particularly the pleadings.

The petitioner states that he is one of the heirs at law of Abraham and Mary Martin, and as such was entitled to the sum of 40,000 dollars: that he was a minor from the death of his father and mother until the 20th November, 1823, when he became of age. That J. M. Martin was appointed his curator, and received the sum of 40,000 dollars, in money, from the other heirs of A. & M. Martin: and in property, which, without any legal authority, and without the approbation of the petitioner, he purchased at the sale of the estate of his father and mother, and which he retained in possession until his death, and is still in possession of his heirs. That the petitioner was not assisted by a curator *ad litem* in the premises, that he utterly disclaims all such acts and doings on the part of his curator, and that in consequence thereof the said J. M. Martin became liable, on his bond, to pay the sum already stated.

The petition proceeds with an enumeration of the property left by the curator, on which the plaintiff avers that he has a mortgage, and concludes with a prayer that the heirs of J. M. Martin, his sureties, and the other persons who have acquired part of the mortgaged property may be cited; that judgment may be rendered against the former for the sum claimed; and against the latter, that the property which has come into their hands may be held subject to said judgment, and sold to satisfy the same.

The persons thus made defendants put in separate answers, according to their different rights, and the views which each entertained of the defence he had to the action. That which first appears on the record comes from one of the sureties.

1. He pleads the general issue.

2. That a regular classification of the estate and succession of John M. Martin was made by the judge of probates, of the parish of Rapides, at which the plaintiff was represented by his then curator *ad bona*, Robert Martin, who claimed for, and had allowed to the plaintiff, as a general privilege, the sum of dollars, which order is yet in force and unrepealed, and operates as the thing adjudged between the estate and the heirs of the said John M. Martin and the plaintiff.

3. That the petitioner has no claim in this suit, because a suit was brought in the probate court of the parish of Rapides, by the representatives of Anna Terrill, one of the heirs of Abraham and Mary Martin, for a partition of the succession of the said Abraham and Mary; and a settlement of accounts among the heirs. That in this suit the plaintiff, then a minor, was duly represented by J. S. Johnson, his curator *ad litem* specially appointed for that purpose, and a decree was given therein, which decree was appealed from to the district court, and there a final judgment was rendered, by which it appears that the petitioner has received more than his portion of the estate of Abraham and Mary Martin, and which decree being unreversed forms *res judicata*, and precludes the plaintiff from recovery in this suit.

We will consider the last of these pleas first, and in order to ascertain whether it has the force and effect contended for, it is necessary to recur to the pleadings in the suit wherein the judgment offered in bar was rendered.

The plaintiffs in that case were the representatives of one of the heirs of Abraham and Mary Martin. In their petition they state, that by an order of the district court of the parish of Rapides, the parish judge of said parish was directed to proceed to the sale of the succession of the said Abraham and Mary; that pursuant to said decree, the whole of the estate was sold; and that, notwithstanding the sale, no final partition of the succession, or settlement of accounts among the heirs had yet been made. That at the sale, the property was principally brought by the heirs or their representatives; and that some of them had bought greatly over their proportion, and were in arrears to others.

They conclude by praying, that a partition of the estate may be made; that the heirs may be cited; that a curator *ad litem* may be appointed to the present plaintiff, and that the court would proceed "to the final partition of said estate among the heirs, and to a full, complete and final settlement of accounts between them; and that the court will decree to each, such sum as may be found due upon said settlement and partition.

The parties appeared in the court of probates, and the judge proceeding to make a settlement, charged each of the heirs with the amount purchased at the sale of the succession of Abraham and Mary Martin; among these charges, the present plaintiff is credited with 33,011 dollars, 50 cents, the amount bought by him, and his share is stated to be 34,146 dollars, 19 cents.

[Martin v. Martin's Heirs et al.]

On the appeal to the district court, the same principles were adopted as the basis of its judgment, and the judge proceeds to state, that in order to a final settlement of the estate of Abraham and Mary Martin, judgment should be given in the manner therein stated. It is unnecessary to set out any part of it except that which decrees to the petitioner the sum of 2159 dollars, 16 cents.

The question then is, whether with this judgment standing unreversed, the plaintiff can recover in the present action?

Assuming for the moment, that it was regularly rendered according to law, our first inquiry must be, what were its effects on the minor? Before going into this question, however, it is necessary to state, that the heirs of J. M. Martin, who are sued now, were parties to the suit, and that their rights were pronounced on, as well as those of the coheirs.

We have already seen that the avowed object of the action, was to obtain a partition and final settlement of the estate of Abraham and Mary Martin. This estate then consisted of the debts due to it from the sale of the property, and the greater proportion of these debts were due by the heirs themselves.

In making the partition the minor is charged with purchases to a large amount. Now the consequence of this most clearly was, to make him owner of the property for the price of which he was debited, and until that judgment is reversed he remains so. The purchase by his curator, confirmed by a judgment of the court, renders him to every purpose the proprietor of it. Nor can the consequences which result from these acts, be evaded by the argument urged by the counsel, that the legality of that purchase did not come in question in that suit. It came immediately and directly in question; for if the purchase had not been decreed to be legal, or admitted to be such by the curator, the judgment must necessarily have been in favor of the plaintiff for his whole share of the estate, instead of the sum of 2159 dollars, which was decreed to him.

Having thus ascertained in what relation the plaintiff stands to this judgment, and his rights under it, we proceed to inquire what is asked for in the present action. The petitioner states, that the purchases made for him at the sale of the estate of his father and mother, were contrary to law, that he disclaims them, and that he is entitled to have judgment against the heirs and representatives of his curator for the amount of said purchases.

If that prayer was acceded to, these proceedings, in relation to the rights of the minor would present very singular features. There would be a judgment of a court of competent jurisdiction, deciding that he was the owner of the property. There would be another which, leaving that judgment unreversed, would declare that he is entitled to the price of it. Now this cannot be, and unless we shall find on further inquiry that the first judgment is absolutely, not relatively, null and void, we are perfectly clear, the plaintiff cannot recover in this action.

The plaintiff contends it was absolutely null, and he has relied on

the principle, that, unless proceedings against minors are conducted according to the legal formalities established for their protection, they have a right to pass them by as if they did not exist, and sue at once to enforce any claim which they possessed anterior to these proceedings having taken place.

It may perhaps be doubted whether the principle relied on, extends to the decrees of a court of justice rendered contradictorily with other parties, whether it does not stand as *res judicata* until appealed from, or set aside by an action of nullity. But we do not find it necessary to go into that question.

It is shown here, that at the time these proceedings took place in the court of probates, the minor was absent from the state: and that his curator *ad bona* being also a party to them, a curator *ad litem* was appointed to defend his interest. This curator *ad litem* appeared and assisted at all the proceedings, and we presume, as the contrary is neither alleged nor proved, that he discharged his duty faithfully.

But that attendance is contended to be irregular and illegal, because the law requires the minor to be cited; and that it is only after he is cited, and appears, that a curator *ad litem* can be appointed to assist him.

If this position be correct, then it must follow that no suit can be commenced against a minor who is absent; and it will also follow that coheirs, and coproprietors, of an undivided thing, may be obliged to remain owners in common, although the law says they shall not;—That any of them, of age, or minors, can compel the others to a partition of the estate which they hold jointly. Civil Code, 184, art. 150.

We think where the minor is absent, that *ex necessitate*, service must be made on the curator, otherwise the rights of persons of age would be suspended by his absence, and his is not one of the privileges which the law accords to minors. The provisions of the Civil Code which treat of the subject of partition, in contemplating the case of absentees, and providing for it, make no difference between those under, and those of full age. In treating of the curatorship of absent persons, it does not distinguish; and the laws of the Partidas, though not expressly legislating for this very case, in their spirit and intent most evidently sanction the course that was pursued here. Civil Code, *tit.* 3, *cap.* 1, p. 16; *Ibid, cap.* 8, 184; *Partidas* 3, *tit.* 2, laws 7, 11 and 12.

On the best view, then, we can take of the whole matter, we think the minor was legally represented in the suit in the probate court, and that, of course, the sentence is binding on him, until it is reversed. *Cur. Phillip., juicio civil, verbo Sentencia, sect.* 18, *no.* 10.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff, as in case of nonsuit, with costs in both courts.

Bullard, for the plaintiff.

Thomas, Boyce, Rost and *Wilson*, for the defendants.

Norwood *v.* Green *et al.* IV, N. S. 175.

The copy of a copy is not good evidence without accounting for the absence of better proof.

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiffs sue to recover certain slaves described in their petition. They obtained judgment in the court below, from which the defendants appealed.

The evidence of title offered on the part of the appellees, is the copy of a bill of sale said to have been executed by John Wyche to their ancestor, by which the property in dispute was regularly conveyed to him, and oral testimony of the contents of the original of this instrument. The copy which was admitted in evidence is taken from the records of Burke county, in the state of Georgia; being certified in conformity with the provisions of the act of congress for such cases. An objection was made, on the part of the defendants, to its admissibility, on the ground of its being the copy of a copy, which the court below overruled, and a bill of exceptions appears on the record to that effect. We are of opinion that it was properly received, under the certificate made in pursuance of the act of congress; leaving its legal effect on the rights and claims of the parties, uninfluenced by its reception.

As the laws of Georgia have not been shown or proved to the court, the effects of an instrument thus circumstanced must be ascertained in reference to the *leges fori.* According to our laws, the recording of an act under private signature, unless acknowledged by the parties to it before the proper recording officer, gives no additional force or effect to the original instrument; and a copy taken from such a record would not be legal or conclusive evidence of the contents of the original. We are, therefore, of opinion that the copy, offered by the plaintiffs, of the bill of sale taken from the records of Burke county in Georgia, does not make out the title to the slaves claimed in the present action. Neither does this copy prove the genuineness of the original, although admitted to record on the affidavit of a subscribing witness to it; for this is *ex parte* evidence, and ought not to be allowed to injure the rights of the defendants.

Admitting the loss of the deed of sale to have been proved in such a manner as to authorise testimonial proof of its contents, we believe that the plaintiffs have failed entirely to prove its truth and genuineness. There is not one witness who says that he ever saw it and

knew the handwriting of the subscribers. Why proof to this effect has not been obtained from the subscribing witness, is not accounted for; and until the impossibility of procuring his testimony be shown, it is doubtful whether inferior proof ought to be admitted. We conclude, that the plaintiffs have not made out their case, and therefore this case is similar to that of Bradford's Heirs *v.* Calvit, 5 *Martin*, 668.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, there be judgment entered for the defendants as in case of nonsuit, with costs in both courts.

Thomas and *Scott*, for the plaintiff.

Bullard, for the defendant.

Hunter *v.* Smith. V, N. S. 177.

The defendant may offer in evidence his own answers to interrogatories propounded to him by the plaintiff in a former suit.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

This case is before us on a bill of exceptions to the opinion of the district court, in refusing leave to the defendant to avail himself of his answer to certain interrogatories put him by the plaintiff in a former suit between the parties, which was discontinued.

The district court in our opinion erred.

The defendant has an undoubted right to avail himself of his own answer to the plaintiff's interrogatories, and such answer is a legal piece of evidence which may be used by either party. Berthole *v.* Mace, 5 *Martin*, 592.

The legislature has declared that such an answer is evidence in favor of the party answering, unless contradicted by positive literal proof or two witnesses. Civil Code, 316, art. 263.

Can the plaintiff deprive the defendant of this undoubted right to use the answer in evidence, by dismissing his suit and recommencing it?

The defendants may give in evidence the record of a former suit, between the parties, although it was dismissed. Bore *v.* Quierry's

Ex'rs, 4 *Martin*, 545. Yet, the suit was dismissed, not by the plaintiff's sole act, but upon an agreement between the parties.

The record of a suit is evidence, although the proceedings were not continued, until judgment. Barlow *v.* Dupuy, 3 *N. S.* 442.

A party cannot deprive his adversary of any piece of evidence, which he may incautiously furnish.

Thus we have held, a defendant cannot amend his answer by withdrawing an admission he has made, Vavasseur *v.* Bayon, 11 *Martin*, 639, and that a plaintiff has no right to withdraw his answer to the defendant's interrogatories, although there it was objected to. Posten *v.* Adams, 5 *Martin*, 272.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and the case remanded for trial, with directions to the judge to permit the defendant to read in evidence his answer to the interrogatories put to him by the plaintiff, in the former suit, and it is ordered that the plaintiff and appellee pay costs in this court.

Thomas, for the plaintiff.

Baldwin, for the defendant.

Thomas *v.* Callihan's Heirs. V, N. S. 180.

The credits of a defendant may be seized in execution.

The recording of a transfer of a debt in the office of the parish judge, does not operate as a notice to third persons.

SIXTH District.

Mathews, J., delivered the opinion of the court.

In this case the plaintiff sues to have a judgment made executory against the heirs of the person against whom it had been rendered.

The facts of the case, which appear important in coming to a just decision on the questions of law contained in it, are as follows: John Stafford, obtained a judgment against the ancestor of the defendants, which he assigned and transferred to the plaintiff, and which together with the agreement of transfer, was recorded in the office of the parish judge; Leroy Stafford obtained a judgment against the assignor, and caused the interest of the latter in the judgment against Callihan, to be levied on and sold to satisfy his judgment, purchased by

himself at the sheriff's sale, and has transferred the right which he has thereby acquired to the appellants for a valuable consideration. The transfer from J. Stafford to the appellee was previous to the seizure and sale under Leroy's judgment.

Out of these facts two questions of law arise. The first relates to the legality of seizing in execution credits or choses in action of a debtor. The second has reference to the notice which the law requires to be given in a transfer of debts, so as to bind third persons.

The first of these questions depends on a general principle of law, and has been settled in the affirmative by a decision of the court reported in 2 *N. S.* 616. It is true that some alteration has been made, restricting the right of plaintiffs in execution, by an act of the legislature subsequently passed; but this law has not produced any change which can affect the rights of the parties to the present suit.

In regard to the question of notice, the plaintiff relies principally, if not solely, on the circumstance of having caused to be recorded the judgment and act of transfer, in the office of the parish judge, previous to the levy made on it by Leroy Stafford under his judgment against the transferror. We are of opinion, that this recording was not such notice to the debtors as is required by law.

It is not a record of an act required to be recorded, for the purpose of warning or notifying third persons, whose interests might be affected by it. The notice necessary in the assignment of debts, not regularly negotiable, according to law merchant, may be fairly assimilated to the notice which must be given to endorsers of promissory notes and drawers of bills of exchange; and, although the same exactness and promptitude may not be required in the former case as in the latter, yet to affect the rights of third persons, personal notice or something equivalent must be given, and proved in the event of any contest on the subject; which we think has not been done in the present case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below, be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that judgment be entered for the defendants and appellants, as in case of nonsuit, with costs in both courts.

Rost, for the plaintiff.

Baldwin, for the defendants.

Johnson *v.* Kirkland. V, N. S. 182.

COURT of Probates of the Parish of Catahoula.

The process verbal of the probate of a will is void, if it does not state, "that the will was read in an audible and distinct voice to the witnesses and bystanders." See Code of Practice, art. 942.

Bakewell *v.* Coe *et al.* V, N. S. 185.

SIXTH District.

To give the Supreme Court jurisdiction the matter in contest must exceed 300 dollars. Constitution, art. 4, sect. 1.

Boatner *v.* Henderson *et al.* V, N. S. 186.

If the mortgaged premises are rendered less valuable by the acts of a third possessor, he will be responsible to the mortgagee.

Erecting works on a stream of water, by which a mill previously placed there is prevented working, is illegal.

And it is immaterial whether the obstruction is created by preventing the stream from descending, or by throwing the water back on the old mill, so that it cannot work.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The defendants were owners of two tracts of land, situated on a

small water course in the parish of Rapides. The upper one was acquired by them by purchase, and at the time they bought it, was subject to a mortgage in favor of the present plaintiff. On the premises was erected a grist and saw mill, and the land is stated and proved to be of no value except for a mill seat.

The plaintiff not receiving payment of his debt, proceeded, by an action of mortgage, to have his lien carried into effect. While these proceedings were pending, the defendants commenced constructing a dam and a mill on the lower tract owned by them, and the very day, or the day after, the mortgaged premises were adjudged to the plaintiff, who became the purchaser. Under the sale made at his own instance, they finished the construction of the dam.

The new works were erected so near to the old ones, that it was found that the water collected in the dam rose to such a height that it completely impeded the use of the mill originally placed on the mortgaged premises. Upon this fact being ascertained, the plaintiff commenced the present action, in which he stated that these new works had been erected with the intention to injure those belonging to the petitioner, that he had sustained damage, in consequence thereof to the amount of 10,000 dollars, and he prayed that he might have judgment for these damages, and that the works erected by the defendants might be abated.

The defendants pleaded that the plaintiff had shown no cause of action, that they had a right to erect a mill and dam on their own land, and that the plaintiff purchased with a full knowledge of these obstructions.

The cause was submitted to a jury in the court below, who found a verdict in favor of the plaintiffs for 1,000 dollars, which verdict the court confirmed by their judgment, and further decreed, that the works erected by the defendants should be abolished.

The first question in the case is, whether the defendant, having purchased the mortgaged premises, did not acquire a right to make any change he pleased in the buildings erected thereon? And we are of opinion his right to do so was undoubted, provided he did not diminish the value of the property. On this subject we have an express provision of law. "The deterioration which proceeds from the deed or neglect of the third possessor, to the prejudice of the creditors who have a privilege or mortgage, gives rise against the former to an action of indemnification." Civil Code, 462, art. 48.

The second is, whether the defendant had not a right to erect the mill, on his own land, whether it injured that of his neighbor or not? or, as the case was put at the bar, whether he had not the same authority to place works of this description on his land, as the plaintiff had to erect them on the adjoining soil, which was his property?

It is a general principle of law, that owners may use their property as they please, with the exception that they do no injury to others. *Sic tuum utere, ut alium non lædas.* But it would seem that this obligation ought not to be increased by the circumstance of others hav-

ing previously commenced using their property in such a way, as that the purposes to which they have applied it conflict with mine. Our Code, however, appears to limit the right of ownership in this way, and in its provisions on this head, it distinguishes between works which damage the buildings of a neighbor, and those which produce an inconvenience, declaring the first to be illegal, and the other but the exercise of those rights which appertain to the ownership of property. Civil Code, 136, 16.

In this case, the injury complained of is the erection of a dam, by which a reflux of water is created, so that the plaintiff cannot use his mill as formerly. Whether this be one of those acts by whichan inconvenience would be produced, or a damage inflicted, might, perhaps, be doubted, though it would seem to belong to the latter class. But on this subject we have a positive law of the *Partidas*, which declares that a man can not erect a mill near another, so as to obstruct the current of water to that previously erected. It is true this law contemplates only the case of an injury done by preventing the water from descending, but the injury is the same where the water is thrown back. The object of the law was, to protect old works of this kind from being impeded in their operation by the erection of new ones; and whether this is done by obstructing the current so that no water can reach the wheel from above, or by sending so much water back on it from below, as that the mill can not be used, is a difference but in name, and we have no doubt the prohibition extends to the one act, as well as the other. *Par.* 3, *tit.* 32, *law* 18.

The last point made in the cause is, that the damages are excessive. The jury and the judge below have thought they were not, and we do not think the case shows them so clearly so, as to authorise us to disturb the verdict. The property of the plaintiff is proved to be of no use but for a mill seat, and for that purpose to be considered of great value, if we may judge by the high prices paid for it by the persons through whom title has descended to the petitioner. From the time of the obstruction, up to the rendering the verdict, fifteen or sixteen months had elapsed, and we are unable to say the jury erred in considering that the use of the property was not worth 1000 dollars for that space of time.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Scott and *Thomas*, for the plaintiff.

Wilson and *Johnston*, for the defendants.

Rost *v.* St. Francis's Church. V, N. S. 191.

The appellant has three judicial days after the return day, to file his appeal.
No change can be made in the pleadings, without leave of the court or consent of the opposite party.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff and appellee prays that the appeal may be dismissed, because it was returnable to the first Monday of October, 1825, and the transcript was not filed into the clerk's office till the 14th of that month.

The October term, 1825, entirely failed, two of the judges having been prevented by indisposition from meeting the third.

Admitting that the transcript of the record must be filed on the return day, into the clerk's office, whether that be a judicial day or not, Code of Practice, 587; the transcript in this case was filed before the expiration of the three days of grace, which the law grants to the appellant in filing the transcript, and during which he may show that he was by some accident not within his control, prevented from filing his transcript, and before the expiration of which the clerk is forbidden to certify that the transcript is not filed. *Ibid.* 589, 883.

Those days must be judicial days, for on no other has the appellant the chance of showing that he is not in fault.

As the certificate that the transcript is not filed, enables the appellee to have the judgment executed, and prevents the appellant from obtaining a new appeal, *Ibid.* 594, the latter must have the opportunity of showing cause against the issuing of the certificate.

We notice on the record a bill of exceptions taken by the counsel of the defendants and appellants, on overruling their motion to have a supplemental or amended petition, which the plaintiff had filed without leave, rejected.

On this point the opinion of this court is with the defendants. Neither party can make any alteration or change in the pleadings, without the consent of his adversary, or leave of the court. Thus in the case of Robinson *et al. v.* Williams, in which the plaintiff complained that the district court had acted on an amendment filed, without leave, by the defendant to the answer, we reversed the judgment of the district court, and remanded the case with directions to the judge not to admit special matter as evidence of the plaintiff's claim under this amended answer. 3 *N. S.* 665.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge, absolutely to disregard and cause to be disregarded the supplemental or amended petition of the plaintiff and appellee, and it is ordered that he pay costs in this court.

Rost, for the plaintiff.

Baldwin and *Deblieux*, for the defendants.

King *et al.* v. Havard. V, N. S. 192.

A debtor cannot be compelled to pay several transferees to whom the creditor may have assigned separate portions of the debt.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The petition states that Garriot having obtained a judgment against the defendants, for 800 dollars and interest, assigned 300 dollars of it to Holloway, 150 dollars to the plaintiffs, King & Beatty, and 40 dollars to the plaintiff, Thomas; wherefore judgment is prayed against the defendant in favor of Beatty & King for 450 dollars, they alleging themselves to be the tranferees of Holloway, and 40 dollars in favor of Thomas.

The defendant pleaded the general issue and the indivisibility of Garriot's claim against him, compensation, &c. The plaintiffs had judgment, and the defendant appealed.

There is evidence, that after the assignment to Holloway, Paul called on the defendant for payment, and he said he would pay, although he would lose so much money, and that he would settle with King & Beatty.

That a debtor cannot be compelled to pay his debt to a number of transferees, among whom it may have suited the convenience of his creditor to distribute it, results from his right to resist his claim for partial payments: for the protection the law affords to the debtor in this respect, if the creditor might do indirectly what he is forbidden to do directly, by transferring parcels of his claim to sundry persons, would be nugatory.

[King *et al.* v. Havard.]

El acreedor no puede pedir, ni cobrar, la deuda en parte, contra la voluntad del deudor. *Cur. Phil. Comm. Terr.* 22.

Le creancier ne peut forcer le debiteur a payer par parties. *Dumoulin, de dividuo et individuo, n.* 6 and 7; 6 *Toullier*, 776, 777.

The district court, in our opinion, erred in coercing payment from the defendant by parcels.

As the transfer to Holliday was approved of by the defendant, and he promised to pay, he must be bound by his assent to the severance of the sum transferred to Holliday from the claim of Garriot.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment against the defendant in favor of King & Beatty, for three hundred dollars, with interest from the inception of the suit; and that there be judgment against Thomas; the appellees paying costs in this court, and the defendant below.

Thomas, for the plaintiffs.

Oakley, for the defendant.

Bullard *v.* Wilson. V, N. S. 196.

Whether the endorsee take up a note by payment or by novation, his recourse against the endorser is the same.

A witness swearing that he had no recollection of giving the notice of a protest, except from the memorandum on the back of it, but that he had no doubt he had given it, or he would not have made such a memorandum, is legal proof that the notice was given.

SIXTH District.

In this case the Court said:—The plaintiff, as endorsee, sues the first endorser, who pleaded the general issue, and that the maker of the note obtained an accommodation on it in bank—that the note was not paid by the plaintiff, but the debt of which it is the evidence, was extinguished by novation, the bank having received in exchange another note for the amount of the one on which the maker might, according to agreement, have obtained a renewal—that the plaintiff is not the owner of the note sued on—that the defendant received no consideration for his endorsement, nor any notice of protest.

There was judgment against him, and he appealed.

[Bullard v. Wilson.]

The protest was produced, and the signatures of the makers and all the endorsers anterior to the plaintiff, were proved.

The cashier deposed that the maker of the note had accommodations in bank to a large amount, for which various notes were given, and the debt was gradually reduced, after several renewals, to the sum for which the note sued on, was given—severel sums from different loans being consolidated. At the maturity of this note, the defendant declined farther endorsements, and the plaintiff took it up after protest, by paying the proportion required on the renewal, and giving his own note for the balance. The proceeds of this last note were placed to the plaintiff's credit, and he gave a check for the whole amount of the note sued on, which was surrendered to him by the witness—who would not have paid the proceeds of the note last discounted, to the plaintiff, while he stood debtor on his endorsement, if the money had not been called for to pay the protested note.

The parish judge's memorandum of his having given the protest to the defendant in person, was on the back of the protest, and he deposed he had no recollection of giving it, but he had no doubt of his having given it, as he never made such a memorandum without having given the notice.

The endorsement of the note by the defendant to Thomas, and by Thomas to the plaintiff, are proved—so is the protest, and the payment of the note by the plaintiff.

There is as good evidence of the notice as is possible to be expected. A notary who daily protests and gives notice of the protest of a great number of notes, cannot possibly be able, at a distance of time, to recollect the very day he gave a particular notice, unless, immediately after he gave it, he made a memorandum of it; and it is from the information which his memorandum recalls, that he can satisfactorily establish either the day, the place, or the person whom he notifies.

In this case, therefore, the notice is duly proved. See Alton *et al.* *v.* Trimble *et al.*, 4 Bibb, 22.

There was no novation of the debt of the maker of the note, nor of the defendant.

The plaintiff, being bound to pay the amount of the note, after protest and notice, discounted his own note, and paid its proceeds, and another sum of money to discharge his debt to the bank and acquire a right to his reimbursement, on the maker and the anterior endorsers. Whether he novated or paid his own debt is immaterial as by either way he was subrogated to the rights of the bank.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Bullard, for the plaintiff.

Wilson, for the defendant.

White *v.* Cumming. V, N. S. 119.

In a hard case, the court will not mulct a defendant in damages. What is to be called *a hard case?*

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The defendant states the note he is sued on was given for the price of a negro boy, sold him by the plaintiff; who represented him as very healthy and a valuable field hand, while "he is on the contrary, and ever since he purchased him has been sickly, languid and stupid, and so much addicted to stealing, as to be a constant damage, and is unfit for the purpose for which he was intended." He concludes with a prayer for the rescission of the sale, or a diminution of the price.

The plaintiff being interrogated on oath, by the defendant, declared the note sued on was given for a part of the price of the slave mentioned in the answer, and the balance of the price, two hundred dollars, was paid him by the defendant; that he, the plaintiff, did not most particularly state to the defendant that the slave was strictly honest, remarkably healthy, and a fine field hand; the slave was never before the purchase in the possession of the defendant.

The plaintiff had judgment and the defendant appealed.

The statement of facts shows that

Bray deposed, that when he first saw the slave, the defendant and his wife said he was unwell. He was purchased in the summer, and was sent to the plantation of the witness in the fall. He was very much swollen. The witness first saw him two or three weeks after he was bought. The slave always, at times, appeared subject to swelling. He is lazy and indolent, more so than any of his age the witness ever saw; the witness would not keep him for his victuals. He is stout and strong and looks tolerably well.

Dr. Sebly deposed the slave was brought in four or five weeks ago considerably swollen, in the belly, face and eyes. He bears old marks of frequent bleedings. The witness can not tell whether his disease be ancient or recent; but thinks it is an incipient dropsy. The slave is now better. A dropsical state of the system is not easily removed, but the cure is easier in young than in old persons.

The defendant has failed in establishihg a redhibitory defect, and was properly refused relief, although his bargain appears a hard one, but we do not think ourselves bound to mulct him in damages.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs in both courts.

Thomas, for the plaintiff.

Scott, for the defendant.

Byrd *v.* Bowie. V, N. S. 201.

If the contract be usurious, the creditor can only receive the principal, without interest.

SEVENTH District.

PORTER, J., delivered the opinion of the court.

The defendant, sued on his promissory note, pleads payment—that his co-obligor, many years since, delivered to the plaintiff a negro man worth 1200 dollars, whose value ought to be imputed to the payment of the note—and that he further delivered two negro men to labor for the petitioner, whose services were worth more than the amount of the obligation.

There are interrogatories annexed to the answer, but it is unnecessary to set them forth, or the replies which were made to them.

The delivery of the negro man, in payment, is proved, and a receipt of the plaintiff's shows that his value was fixed at 550 dollars.

The only difficulty in the case relates to the other negro, who, the defendant affirms in his answer, was delivered on hire. If this were true the court would be inclined to think that the services of such a slave were not worth more than the use of 1200 dollars; but the evidence offered, and received in the cause without opposition, shows that the negro was sold and delivered to the plaintiff, in absolute property, and that the consideration for the sale was the loan of the sum already mentioned, for the space of four months. This is one of the strongest examples of usury and extortion, which has yet come before this court. The defendant is clearly entitled to a credit for the value of the slave, which is proved to have been 350 dollars, and the plaintiff can only recover the balance of the principal without interest. Hermann *v.* Sprigg, 3 *N. S.* 190.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the plaintiff do recover of

[Byrd v. Bowie.]

the defendant the sum of 300 dollars, with costs in the court of the first instance, those of appeal to be borne by the appellee.

Scott, for the plaintiff.

Oakley, for the defendant.

Sterling and Wife v. Drew *et al.* V, N. S. 203.

The possession acquired by actual occupation, though not maintained during the whole period required for prescription, cannot be interrupted by a possession merely civil. Where both claimants have obtained a relinquishment from the United States, he who had the best title from the Spanish government will prevail.

SEVENTH District.

MATHEWS, J., delivered the opinion of the court.

The plaintiffs in this case claim title to a certain tract of land described in their petition. The defendant, Drew, disclaimed any right to the property, and the inhabitants of the parish of Ouachita were permitted to interfere in the suit, and become defendants. Judgment was rendered in their favor in the court below, from which the plaintiffs appealed.

The title set up by the latter is founded on an incomplete grant from the Spanish government to one Epinette, who conveyed his right to the Baron de Bastrop, from whom the title has been transmitted to the appellants, through several mesne conveyances, and has been recognised and confirmed by the United States.

The defendants claim title to the premises in dispute as having been set apart for the use of the parish, to be employed in public purposes, such as a burying ground and site for a church. This claim has been also confirmed by the government of the United States.

In support of the plaintiffs' title, prescription is relied on as based on possession of ten years, and in their claim this must also be taken into view.

In the act of sale from Epinette to Bastrop, the land sold is limited by that now claimed by the defendants. All the subsequent deeds embrace it within these limits. Possession since the year 1810 is proved to have been held under Bastrop's sale, which included the disputed property. Those who claim in conformity with this deed, have had only a constructive possession of the land now sued for,

unsupported by any title emanating from the former sovereignty of the country, for the act of sale from the grantee, under which their title is deduced, does not convey it to Bastrop. It is, however, a possession, by which they have obtained a relinquishment of the title of the United States, and is, perhaps, such as would have been sufficient to create title by prescription, were it exclusive and uninterrupted, *ab initio.* Opposed to this possession is one set up by the defendants, which is supported by evidence, showing that the inhabitants of the parish did use the land in the manner and for the purposes for which it is separated and set apart from the public domain. They enclosed part of it with fences, and buried their dead in it. These uses afforded the only means of taking possession, which united the will to possess with actual occupation, so far as the nature of the thing and its destination would permit. A possession thus commenced is well retained by the *animus retenendi*, which is presumed by law, and cannot be interrupted by an adverse possession merely civil or constructive. The plaintiffs, therefore, cannot succeed on the ground of their prescriptive title.

It then only remains to examine their pretensions, as supported by other evidences of title. These are the deeds of sale above stated, and they do not ascend so as to show any concession, even of the most imperfect and inchoate kind, from the Spanish government, which includes the land in dispute. It is true that this property has been relinquished and confirmed to them by the succeeding government, but it has also been relinquished and confirmed to the defendants. The respective claims and rights of both parties to the suit, rest on the titles which were obtained from the Spanish government, and if they be not equally weak and without foundation, we are of opinion that the preponderance is in favor of that relied on by the defendants, as it is shown that the disputed ground was laid off and set apart for the use of the inhabitants of the parish.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Oakley, for the plaintiffs.

Thomas, for the defendant.

Overton *v.* Archinard. V, N. S. 207.

Property subject to mortgage for principal and interest of the price of a tract of land, is not subject to a demand for interest on interest growing out of a subsequent agreement of the parties.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff charges that in November 1819, he sold to Pannel, a plantation and negroes, for 44,000 dollars, with interest at ten per cent. a year, from the first of February, 1820. A sum of 4000 dollars, being payable on the 31st of March, 1820, and 40,000 on the 6th of November, 1829; the interest, however, being payable yearly on the 1st of March, and Pannel mortgaged, among other property, a negro slave named Delphia, now possessed and claimed by the defendant; that a sum of 1600 dollars, part of the principal and interest, is still due him; that Pannel has failed, and is since dead, and the plaintiff has a judgment against his syndics. The petition concludes with a prayer that the defendant may be decreed to pay, or that the slave be seized and sold, for the payment of the sum due, and costs.

The defendant pleaded the general issue, and called Le Gras, his vendor in warranty, who brought in Scott.

Scott pleaded the general issue and payment by Pannel in his lifetime.

There was judgment for the defendant, and the plaintiff appealed.

The question turns entirely on the plea of payment. That the principal is paid appears by the receipts of Overton, duly recorded or authenticated, by which he acknowledges the receipt of the sums of 4000 dollars, and 1000 dollars, on the fifth of January, 1820, and 19,200 dollars, on the 10th of March, 1820, expressly as part of the principal; and 19,800 dollars, on the 6th of April, 1823, being part of the sum of 44,000 dollars, agreed to be paid by Pannel for the plantation and negroes, for the payment of which the slave was mortgaged.

As to the payment of the interest, the plaintiff's receipts are produced for 4500 dollars, and it is further shown that the plaintiff received Pannel's obligations for 120,000 weight of cotton in 1822, payable by instalments, and the delivery of the cotton was secured by a mortgage. The cotton is shown to have been worth upwards of 12,000 dollars.

On these facts, it is contended, on the part of the appellee, that the

appellant is without right, and that the principal is expressly acknowledged to have been paid, and the interest was paid in part, and novated for the remainder.

It appears that the first instalment was paid on the 5th of January, and the interest was not to run until the first of February; and that on the former day the second instalment was reduced to 39,000 dollars.

That the interest on that sum, to the day of the payment of 19,000 dollars, is 2025 dollars; and the interest on the balance, 19,800 dollars, from the latter day to the last payment, April 6, 1823, two years and sixteen days, is 4043 dollars, making the aggregate of interest 6068 dollars. Of this sum, 4500 dollars appears to have been received by the plaintiff's express receipt, and the balance of 1568 dollars, is more than covered by the value of the cotton.

The appellant urges that what is done in a contract, rather than what is said, ought to give the character to every one of its parts—that, although the parties have said the price was 44,000 dollars, payable, 4000 dollars on the 31st of March 1820, and 40,000 dollars on the 6th of November 1829, with interest at ten per cent. payable yearly on the 1st of March, the vendor stipulated for, and the vendee agreed to, a price of about 80,000 dollars, payable 4000 dollars in March 1820; 4000 dollars on the 1st of March, in every year, until 1829; and 40,000 dollars on the 6th of November 1829.

It is urged that this was the intention of the parties, because it appears their calculation was made accordingly—and the interest has been calculated on the 4000 dollars called yearly interest, because the parties, by the agreement that the 4000 dollars should be demandable independently from the principal, have made this interest principal, as it became due.

This mode of reasoning is certainly morally correct, and perhaps legally so, between the parties to the contract, who ought to comply with its stipulations in the manner in which they were conscious they were understood. But when the contract is to be enforced against a third party, he may refuse to be bound by the acts of his vendor, beyond the terms consigned in the deed—and insist that they should receive a construction according to their legal import, unaffected by any arrangement of his vendor after the sale.

The mortgagor sold the slave to the person through whom the defendant mediately claims, on the 6th of December 1819, one month after she was mortgaged to the plaintiff. At that time no part of the capital or interest was payable. If three years afterwards, the mortgagor, on settling with the mortgagee acted in such a manner as to furnish evidence that he considered himself bound to pay interest on interest, or on what he had called interest, and what we are bound to consider as such, this circumstance can not prevent the liberation of the defendant, as soon as the mortgagee appears to have received what was legally his claim under the mortgage.

The vendee of land and negroes, neglecting to pay the price on the

day stipulated, is liable to pay interest, although the contract be silent on this head; but no interest is due for a delay in paying that interest. His specific agreement may bind him to more than legal interest, as to a payment of interest independent of the principal; but it never can render that interest, an independent part of the price demandable as such, even if the vendor, not choosing to avail himself of the delay, effects the payment before.

In the present case, there can not be any doubt that the plaintiff's receipt for 44,000 dollars, would have prevented the demand of any part of the yearly payment of 4000 dollars, for interest accruing after the payment.

We think the defendant has clearly shown that the whole price and interest, according to the legal construction of the deed of sale, has been paid or novated, and that therefore the mortgaged slave is liberated from any claim of the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Oakley and *Rost*, for the plaintiff.

Scott, for the defendant.

Cohen *v.* Havard. V, N. S. 212.

SIXTH District.

Notice to take depositions may be left at the domicil and this suffices as if served personally.

Baillio *et al.* v. Wilson *et al.* V, N. S. 214.

The court of probates may decide on the validity of a sale of land, when the question arises collaterally in the examination of other matters of which it has jurisdiction.

When the appeal does not stay execution, the reversal of a judgment in the appellate court, does not avoid the sale made under an execution issuing from the inferior court in virtue of the judgment.

But if the judgment of the inferior court was for the delivery of a specific thing, and this object was delivered in consequence of the party not being able to give security on the appeal, the reversal of the judgment would enable the appellant to get back the property detained in satisfaction of it.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This action commenced in the court of probates, and on judgment being rendered there against the defendants, they appealed to the district court, where that of the probate court was reversed. From this judgment the plaintiffs have appealed.

The petitioners state, that in the year 1818 they sold and conveyed to one James H. Gordon, two tracts of land for the sum of 16,000 dollars, with interest on the different instalments at the rate of ten per cent. per annum; that after executing the said act of sale, the said Gordon departed this life, leaving the said sum unpaid; that his widow, Maria C. Gordon, natural tutrix of the minor children and heirs of her husband, has taken possession of the estate, and is liable for the payment of the debts due the petitioners. That since the death of James H. Gordon, the petitioners have proceeded against the said Maria, and her husband, Wm. Wilson, with whom, since the death of James H. Gordon, she has intermarried, have obtained judgments and issued executions against them, and under the sales made in pursuance thereof have purchased the lands and hold them. That since the lands were sold, the defendants took an appeal and had these judgments reversed: that the lands still belong to the petitioners, but that there is a large balance yet due to them, and that the succession is solvent and able to pay them. That the funds are in the hands of the defendants, who are liable for the payment, and that though a long period has elapsed since the death of James H. Gordon, the said Maria, as tutrix to her minor children, who accepted the succession with the benefit of an inventory, has failed to render an account of her administration. The petition concludes by a prayer that the defendants may be cited and compelled to render a full and

complete account of the administration of the said estate, and that they may be condemned to pay the amount due the petitioners, with interest and costs; and further, that the validity of the sales made to them may be inquired into.

The defendants severed in their answers. Wm. Wilson pleaded the general issue, and denied the jurisdiction of the court.

His co-defendant also pleaded the general issue. She averred that she had renounced the community with her late husband; that, as tutrix to her children, she had administered on the estate; that she had caused a large part of the property to be sold at probate sale; that the lands which had been mortgaged to the present plaintiffs were offered for sale without success; that she was proceeding to cause other and further appraisements to enable her to pay the plaintiffs, but that they, not satisfied with these proceedings, instituted suit in the district court against the defendant and obtained judgments, which have been since reversed and annulled. That under these judgments the lands have been taken out of the possession of the defendant, as she was unable to give bond to stay the execution. That she has taken all legal means to procure restitution to the mass of the estate of the lands sold as aforesaid, so that she may proceed to a final administration. That she does not believe there will be property sufficient to pay the debt due by the estate, but that she can not ascertain how much the deficit will be until the lands purchased by the plaintiffs shall be sold. That she has made many payments to creditors. That she has been always willing to render an account, and still is so. That she hath done no act to render her liable in her private capacity, and that if she has, the court of probates has no jurisdiction of the demand, nor has it any to examine the validity of the sale of the lands; and finally, that no judgment can be given against her for a specific sum until the whole of the estate shall be sold.

The first questions to be examined arise out of the pleas presented to the jurisdiction of the court, and we think the defence well offered to that part of the petition which alleges the personal responsibility of the defendant, by reason of her mal-administration. Such action should be commenced in the district court.

But we do not think the court of probates is without jurisdiction to examine into the validity of the sales made under the judgment of another tribunal. It is true it wants the power to decide directly on titles to land; but where the question arises collaterally, and an examination of it becomes necessary in order to enable the court to arrive at a correct conclusion, on matters of which it has jurisdiction, as in the case before us, where the object is to ascertain how much is due by the estate, then the court, of necessity, must examine whether the sales made entitle the defendants to a credit.

The defendant is equally ill founded in her objection, that no judgment can be rendered against her for a specific sum, until the whole of the estate shall have been sold. A creditor, whose debt is disputed

by an administrator of an estate, either in whole or in part, has a right to demand that it shall be liquidated and ascertained by a judgment, although after that judgment be rendered he may not be authorised to issue execution on it. A contrary rule would delay the creditor, unnecessarily, by compelling him to liquidate his claim after funds had come into the hands of his administrator to pay him. He may do it before, and have his debt established, so that when money is received by the representatives of his debtor, they must pay him without further delay.

The district court gave judgment against the defendant, as tutrix of the minor children of James H. Gordon, for 8666 dollars and 66⅔ cents, and directed the mortgaged premises to be sold by the probate court, for cash, that the proceeds should be first paplied to the payment of the plaintffs' demand, and that if any balance should remain due, that they be paid in common with the other chirographary creditors.

Though this judgment does not expressly pass on the validity of the sales made under the judgments obtained in the district court, it impliedly considers them void and of no effect, and the correctness of this opinion is the principal question which the cause presents, and that which has been most discussed at the bar.

It is one of considerable importance, but not of much difficulty. The acts of the legislature provide that on all judgments rendered by the courts of juctice of this state, executions may issue after a certain number of days, unless these judgments shall be stayed in their execution by an appeal. And they further provide, that no appeal shall stay execution unless the party cast, shall give bond, with good and sufficient security, in a sum not exceeding double the value in disputo. 1 *Mart. Dig.* 438.

These acts also provide for the manner in which executions shall issue—their form and effects: and one of these effects is expressly stated to be "that a sale under them shall vest in the purchaser all the right, title and interest which the defendant had in the thing sold." They make no distinction between executions, on judgments final, in a court of the last resort, and those emanating from a tribunal whose decrees are subject to revision and reversal; all are declared to vest the title of the defendant, absolutely, without condition of any kind. It is clear then that we have not the authority to say, that on any subsequent event that title shall be divested. 2 *Mart. Dig.* 172.

The letter of the law being therefore directly opposed to the construction contended for by the appellees, it might be sufficient to leave the question on that ground alone, but as the contrary doctrine has been strenuously contended for, it may not be amiss to consider the subject in other points of view.

The legislature, in acting on this matter, had, as they have in most others, but a choice of inconveniences. On the one hand there was that of permitting debtors to waste their property, or put it out of the reach of their creditors, during the period that might elapse between

giving judgment in the court of the first instance, and that of the appellate tribunal: on the other, that of exposing the defendant to the hardship of having his property sold at, perhaps, less than its real value to satisfy a judgment which might be reversed. They chose the former as the least evil of the two, and we think wisely. The presumption is against the debtor and in favor of the judgment rendered against him, and he should not be permitted to delay its execution unless he can place the person, in whose favor it has been rendered, in as good a situation as he would have been, had the appeal not been taken.

If we suppose these to have been the motives why these laws were passed, and we can imagine no other, the principles contended for by the appellee would defeat the object contemplated by the law maker. No one would purchase at a sheriff's sale, on the risk of having the property taken out of his hands, with an uncertain recourse on the creditor for the purchase money, who might be a non-resident, or have become an insolvent in the interval between judgment below and above; or if he did, he would do it at such a hazard as would make the contract in effect more resemble an aleatory one than any thing else, and consequently the goods of the debtor would be always sold at a sacrifice, for the purchaser would seek indemnification for the danger to which he was exposed, in the profit which he might hope to make. Execution is quaintly, but truly, called the life of the law. The doctrine on which these sales are sought to be avoided, would make it any thing else, or if, in some cases, it would have that effect, it would be with great injury and loss to the defendant.

It was urged from the bar, that as the only authority for the execution was the judgment of the court, the reversal of that judgment necessarily rendered every thing which had been done under it, void. But the position we consider to be quite untenable. The destruction of a power does not carry with it the destruction of the effects which that power, when in force, may have produced. This might be illustrated in a variety of ways, and by examples drawn from every science. But we will take one from that which we are most in the habit of studying and best acquainted with. If an agent should sell a tract of land under a power of attorney, a subsequent revocation of that power would surely not annul the sale that was made under it.

Again, if the legislature had contemplated that any such consequence was to result from the reversal of the judgment we must presume they would not have neglected to make particular provisions in relation to it, in order to meet the exigencies of different cases. For even on the principles contended for by the appellees, it is not every reversal which should produce a rescission of the sale. The judgment may be only avoided in part, and confirmed for an amount greater than that made on the execution; it may be remanded, for some mistake in conducting the proceedings below, and ultimately confirmed to the whole extent of the first judgment. Cases, then so entirely dissimilar from those where the decree of the court of the

first instance is reversed *in toto*, would, we believe, have received, as they certainly required, different regulations, if it had been intended that a reversal of the judgment of the inferior court should annul the sale by the sheriff made under it.

There is still another consideration. It is now upwards of twenty years since these statutes have been passed. So far as our experience has extended, this is the first time that an attempt has been made to set aside sales made under judgments which were afterwards reversed; and yet the cases must have been numerous, where there were strong motives to do so. This long acquiescence under the construction which we now adopt, is a powerful argument to show its correctness. It proves how these laws have been understood by the profession.

Leaving the question for a moment on that ground, let us now see what is done in other countries. The form of our writ of execution, as it is well known, comes from the common law. It is a well settled principle in that system, that on the reversal of the judgment of the inferior court, the plaintiff in error is only restored to the money made under the *fieri facias*, not to the thing sold. 2 Tidd's Prac. 1129; 2 Bac. Ab. 506 (Am. ed.); 8 Co. 19 Cro. Jac. 246.

If, indeed, the property is only extended on an *elegit*, the defendant in execution gets it back, because there has been no alienation under the writ. And so it would be here if the judgment of the court below was for the delivery of a specific object, and that judgment should on appeal be annulled. 2 Bac. Ab. 507.

The Spanish law can afford us no guide for settling this question. In that country the adjudication of property under execution, was a judicial act, to which act, purchaser, plaintiff and defendant were parties; from the judgment rendered thereon, the defendant might appeal, and the reversal of the sentence of adjudication left the buyer, of course, without title. The creditor was obliged in all cases by virtue of the law *Toledana*, to give security for the return of the property, in case the sentence of *remate* should be reversed. *Cur. Phil. p. 2, juicio executivo, verbo Citacion; Ibid. Sentencia, sect. 20, no.* 1 and 2; *Ibid. Remate no.* 1; *Febrero, p. 2, lib. 3, cap. 2, sect. fin. no.* 386, 387.

We are, therefore, of opinion that the amount received on these executions must be credited to the defendants, and the debt due to the plaintiffs being fully established, that they must have judgment for the balance due.

The district court, in giving judgment, left out of view the sum of 4333 dollars, and 33 cents, on which the plaintiffs had obtained judgment in the district court, on the ground that as the amount was settled by a decree of that tribunal, it formed a distinct and separate claim, which ought to be presented to the court of probates as such.

But in this it erred. The object of this suit is to ascertain what sum is due to the plaintiffs on the whole transaction, so that the tutrix may pay them their proportion with the other creditors. All the claims then should be embraced.

[Baillio *et al.* v. Wilson *et al.*]

The plaintiffs show that at the death of James H. Gordon, there was due to them 13,000 dollars, with ten per cent. interest. On that sum there has been made by execution, issuing on the judgments obtained on the last instalments, 7160 dollars; the plaintiffs then are entitled to judgment for 5840 dollars, with interest, to be calculated by ascertaining the interest from the time the obligations became due until the day of partial payment, adding the interest to the principal, and deducting the payment. 1 *N. S.* 572; 3 *Ibid.* 487.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiffs do recover of the defendant Maria C. Wilson, tutrix, the sum of 5840 dollars, with interest as aforesaid, to be paid by the said Maria C. Wilson, out of the estate of James H. Gordon, in her hands to be administered as tutrix to his minor heirs. And it is further ordered, adjudged and decreed, that no execution shall issue on the judgment, until the said Maria C. Wilson shall have failed to render her account, according to law, in the court of probates; and to pay over to the plaintiffs such portion as may be due to them as chirographary creditors.

Thomas and *Baldwin*, for the plaintiffs.

Rost and *Wilson*, for the defendants.

Baillio *v.* Baillio. V, N. S. 228.

When the will does not give seisin to the executors, they are all entitled to commission only on the sum which came into their hands to pay debts and legacies.

A donation of community property, by the husband to one of the children, must be collated one half to the father's estate and one half to the mother's.

COURT of Probates of the Parish of Rapides.

MATHEWS, J., delivered the opinion of the court.

This is an appeal from a judgment of the court below, by which the property of the community of the widow and her late husband is divided, and a partition ordered, of the succession of the latter, among his heirs. The appeal is taken and prosecuted by one of the heirs only, whose husband acted as testamentary executor of the deceased.

The case offers two questions for solution. The first relates to the

commission or per centage allowed by law to executors. The second arises out of the manner in which the judge *a quo* directed the collection of certain advances which had been made to some of the heirs and descendants, by their father, before his death.

As to the first of these questions, we are clearly of opinion that the decision of the court below was correct. The will did not give seisin of the succession to the executors of the deceased, and consequently they are entitled to a commission on that part of the estate alone which fell into their hands for the purpose of paying debts and legacies, which has been allowed to them. See Old Civil Code, p. 248 and 172.

The circumstance of the community of property which existed between the widow and heirs of the deceased at the time of his death, renders the second question somewhat difficult to solve.

In the present case, advances were made by donations from the father to some of his children, out of the property of the community, or common stock of acquests and gains belonging to him and their mother, who is still living. In bringing back these donations, a question arises, as to the manner in which they ought to be collated.

The law requires property given in advances to heirs, to be collated to the succession of the donor; and as the husband is master of the community of acquests subsisting between him and his wife during his lifetime, and may sell, or in any other manner dispose of the effects belonging to such community, it would seem that a gift made by him to one of his children, which should, after his death, be subject to collation, ought to be returned *in toto* to his succession. But, according to the most celebrated commentator on the French Code, which is very similar in its provisions to our own, on the subjects of community of goods between husband and wife, succession, and collation, a contrary doctrine is maintained; which requires that, when the donation is of common property, collation takes place by moiety, although the husband should have been sole agent in the gift or advance to the children; and this appears to us to be equitable. See 4 *Toullier, p.* 460, *no.* 464. Collation, however, cannot be required, until the opening of the succession to which it belongs. Admitting that the advances made by P. Baillio to his heirs, must be collated by halves, one moiety to be returned to his succession, and the other to that of his wife, the latter return cannot take place until her succession be opened; this part of the donation must remain undisturbed in the possession of the donees until that event happens. The judge of probates erred in collating the advances made to P. Baillio, as to the whole mass of the community, and giving to the widow one half of the aggregate thus formed. The common property, as it was at the time of the death of one of the partners, should have been divided between the survivor and the heirs of the former; and to the half thus allotted to said heirs, should be added one half of the advances made to them, as subject to collation in the succession of their father; as the other half cannot legally be disturbed until the opening of the succession of the mother, it should not have been acted on.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed and annulled: and it is further ordered and decreed that the cause be remanded to the court of probates, with directions to the judge of said court to proceed to a partition of the estate belonging to the widow and heirs of the deceased, agreeably to the principles laid down in the above opinion. And it is further ordered, adjudged and decreed, that the appellees pay the costs of this appeal.

Johnson and *Baldwin*, for the plaintiff.

Thomas, for the defendants.

Bayoujon's Heirs *v.* Criswell. V, N. S. 232.

SIXTH District.

By our law after the lessee has disclaimed title, and called in his lessors, nothing can be tried between him and the plaintiff but the possessory right. *Partida* 3, *tit.* 2, *law* 29; Civil Code, 375, art. 25; Kling *v.* Fisk, 4 *N. S.* 395.

The absence of an attorney cannot be considered as a good ground for a continuance, unless it appears he was prevented from attending court by some event beyond his control.

In this case PORTER, J., said:

When the jury were about to be empannelled, the defendant objected to the tickets, containing the names of the jury, being drawn out of the box before it was ascertained that there were twenty in attendance. We think this objection well taken, and that the judge erred in overruling it. The Code of Practice requires that before a cause is tried by a jury the original venire should be called over, and if twenty of them be present, that then the clerk shall proceed to draw twelve out of the box to decide the case. According to a statement in the bill of exceptions, there were only five in attendance. This was not enough; that fact should have been ascertained before the drawing commenced, and the number of twenty should then have been made up by talesmen, and the whole of their names be put in the box before the drawing commenced. The provisions in the Code of Practice are not clear, but this is the way we understand them. Code of Practice, 496, 497, 513.

Wright *v.* Harman *et al.* V, N. S. 235.

Sheriffs cannot demand the fees given by law for keeping slaves, unless they are detained in actual custody.

But they may recover on a *quantum meruit* for the moneys actually expended by them.

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff claims remuneration from the defendants, as owners of certain slaves, for expenses incurred by him in feeding and clothing said slaves, whilst under his care and keeping, by virtue of an order of the parish judge. He obtained judgment in the court below for the full amount of his demand, from which the defendants appealed.

Payment is resisted by the appellants on two grounds: 1. That the expenses thus incurred arose out of a criminal prosecution, which they are not legally bound to pay: 2. If they are liable, in any manner, to pay the sums claimed by the appellees, this liability extends only to money by him actually laid out and expended for their use and benefit.

The facts of the case show that these slaves were placed in the possession of the plaintiff, as sheriff of the parish of Rapides, by an order of the judge, made in relation to a criminal prosecution, about to be carried on against one of the defendants; that they were never committed to jail, but submitted to the keeping of a citizen of the parish, who made no charge for the food with which he supplied them; and that the appellee did pay for clothing said slaves 59 dollars, which was absolutely necessary.

This sum is not objected to by the appellants, and, as we are of opinion that the appellee cannot recover more from them on a *quantum meruit*, it is thought to be unnecessary to decide on the first ground of opposition assumed in the defence. It has been already settled, by two decisions of this court, that sheriffs or jailors are not entitled to recover fees from the owners of runaway slaves for keeping them, unless they have been confined in jail, or their keepers have actually incurred expenses in their detention. The same principles which governed in the decision of those cases are applicable to the present. In the case of Morgan *v.* Mitchell, 3 *N. S.* 577, and Montegut *v.* Dauphin, 1 *N. S.* 258.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is fur-

ther ordered and adjudged, that the plaintiff and appellee do recover from the defendants and appellees the sum of 59 dollars, with costs in the court below, and that he pay the costs of this appeal.

Baldwin and *Wilson*, for the plaintiff.

Thomas, for the defendants.

Glaze v. Russell. V, N. S. 237.

SIXTH District.

The law has not left the party a judge of the amount of the bond, even on a devolutive appeal, but it requires him to give bond and surety "to such an amount as the court may determine, as sufficient to secure the payment of the costs." Code of Practice, 578.

Cuney v. Archinard. V, N. S. 238.

When, in the sale of a tract of land there is error as to the quantity contained within certain limits, but none as to the limits, the vendor cannot claim any land lying within these limits. The doctrine of sale *per aversionem* explained.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The ancestors of the present plaintiff and defendant were heirs of Cesar Archinard. Among other property owned by him, was a tract of land lying in the parish of Rapides, on which he had opened a plantation and resided. This plantation, after various sales made in order to effectuate a partition, for the succession appears to have been a subject of great litigation among the heirs, was jointly purchased by the immediate ancestor of the defendant, under a descrip-

tion which stated it to consist of 950 arpents. A survey having been lately made of the land included within the patent, it was found to embrace the quantity of 1854 arpents; and the plaintiffs have brought this action, alleging that the surplus quantity above 950, has never been sold, and that they are entitled to the one half of it.

The inventory and different sales have been introduced, for the purpose of showing what was the understanding of the parties in relation to the true extent of the land in question.

The inventory made in the year 1809, states it to be a tract of land, of 950 arpents, lying on the bayou Rapides, being the residence of the deceased, consisting of a plantation under fence, a dwelling house and out-houses, a cotton gin, press and grist mill, inclusive, and various improvments.

At the sale made by the parish judge, the ancestor of the plaintiffs became the purchaser, under a description as follows—"A tract of land, of nine hundred and fifty arpents, on the bayou Rapides, being the residence or home plantation of the deceased Cesar Archinard and Eliza P. Archinard."

For some reasons, which do not appear in evidence, and which could not be of any importance in deciding on the rights of the parties now before us, the property belonging to the succession was again put up at auction, and at this sale the ancestor of the defendants became the purchaser, the land being described as follows—"950 arpents of land on the bayou Rapides, the tract whereon R. E. Cuney now lives, agreeably to the title papers."

This sale was made by the sheriff, and in the deed of conveyance given by him to the purchaser, the same description is given as that just mentioned.

The title of the land consists in a complete grant from the Spanish government, and it gives the following limits to the land conceded to the ancestor of the parties.

"*Lindando de un lado con tierras pertenecientes a Mr. Duparc, y del otro a las de Don Ricardo Edmond Cuney, como lo demuestro prolixamente el plano figurativo que antecede.*"

"Bounded on one side by lands belonging to Mr. Duparc, and on the other by those of Mr. Richard Edmund Cuney, as is more fully shown by the antecedent plan of surety."

This plat represents the land with the limits there given, and is stated to contain 950 arpents.

The real question in this cause, lies within a very narrow compass. It is, whether the sale was what is called in our law *per aversionem*. It is certainly a correct principle, as contended for by the counsel for the appellants, that where a tract of land is sold as containing a certain quantity, without boundaries being given, that if there be error in both parties, in regard to the quantity, the vendee has no right to demand the surplus. It would be inequitable that he should, for it did not enter into the contemplation of either to make it the subject of the agreement. The doctrine in our law, in relation to sales *per aver-*

sionem, is not understood to affect this principle; but on the contrary, to sustain it. It proceeds on the idea that, where the object is sold in bulk, and by certain limits, it must be understood their attention was more fixed on the size or limits, than on the quantity which it was stated these limits contained. Where the object sold is an island, or a field inclosed, the application of these principles is easy; but where it is of great extent, and the boundaries not perfectly known, as was frequently the case in the early settlement of this state, the reason on which the rule was established certainly does not apply with the same force.

But the case before us is not one which would justify us in taking out of the rule, even on the ground just stated. The land is not of great extent. The parties who were of full age, knew well its limits, and as the purchase was made in reference to these limits, the boundaries must control the quantity.

In the case of Fouche *v.* Macarty, reference was not made to title papers in possession of the heirs, but to those which ought to exist in the office of the notary public; and the opinion of the court went expressly on the ground, that neither seller or buyer knew the fact, that the plantation had received an accession of twenty-six arpents in depth by a second grant from the Spanish government. A conclusion which was rendered very strong in that case, by the circumstance of the heirs being minors, and the sale being conducted by their tutor. In the cause now before us, the heirs were of the age of majority, and they had been for some time in litigation respecting this property. The ancestor of the plaintiff had once purchased it, and had been in possession of it. We have no doubt, therefore, that both knew the limits; and if both knew them, and the one bought, and the other sold, in reference to them, they must control the enumeration of quantity, or in other words, although there might have been error as to quantity, there was none as to boundaries, and the error of the former kind, in a sale *per aversionem*, will not enable the vendor to claim any part of the property contained within these boundaries.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas, for the plaintiff.

Baldwin, for the defendant.

Gardere *et al. v.* Murray. V, N. S. 244.

SIXTH District.

If a judge signs a judgment before the proper time, the party may still move for a new trial, in the same manner as if the judgment was unsigned.

If the party instead of doing this, appeals, he is precluded from urging that the judgment was not final. See 2 *Martin's Digest*, for a provision, that when a court is about to adjourn, a party who has an interest to procure a new trial, ought to make his motion before the adjournment.

Woods *v.* Kimball. V, N. S. 246.

If the owner of land entitled to a pre-emption for lands adjoining it, sell this right to another, and afterwards enter the land subject to the pre-emption in his own name, the title acquired by him will enure to the benefit of the vendee.

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

This is a petitory action, brought to recover a tract of land alleged to be in the possession of the defendant. Judgment was rendered in the court below against the plaintiff, from which she appealed.

The written evidences of title in the appellant, are, a plat of survey for Peret Godo, and a certificate in his favor from the land office; an act of sale from Godo to Perrault, a sale from him to John Wood, and a sale from the latter to E. Wood.

The written evidence of title, offered and received on the part of the defendant, consists of a deed of sale from the heirs of Antoine Godo to Wade Kimbal, a sale from him to Marcote, articles of partnership entered into between the latter and A. Plauche, an act of dissolution of said partnership, a deed of exchange of part of said land to Moreau, a sheriff's sale of the whole tract, as the property of

Plauche, to Joseph Kimbal, and sale from the latter to the defendants. There is also a plat of the whole tract belonging to Godo's heirs, purporting to contain 2000 acres, of which the land in dispute made a part.

There is a bill of exceptions, taken to the introduction of the certificate of the register of the land office, on the part of the plaintiff, which need not be noticed, as we are clearly of opinion, that the whole evidence of the case clearly shows that Perrette Godo, under whom the plaintiff claims the disputed land, obtained his title or claim from the United States in virtue of a pre-emption right which was supposed to exist in him at the time of obtaining the certificate of the register. The evidence in support of the pretensions of the plaintiff would, perhaps, be sufficient to show title in her, and consequently a right to recover in the present suit, if no other title were shown on the part of the defendant.

In the first deed exhibited in his chain of titles, the right of pre-emption to the back lands was expressly conveyed to the vendee, and with this privilege, through several conveyances, it has come to the present proprietor and possessor. Godo, who obtained the title by pre-emption from the United States was a party to the original act of sale under which the defendant claims, and by that act divested himself of any pre-emption right which he might otherwise have had. After such divestment on his part and transfer to his first vendor, any title he may have subsequently acquired, in virtue of the right thus transferred, must equitably enure to the benefit of the latter and those claiming under him. In addition to this strong ground of defence, it is shown by the oral testimony in the cause, that the land now sued for is embraced by the notorious limits of the entire tract of the grantees, heirs of Godo.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Flint, for the plaintiff.

Boyce, for the defendant.

Adams *v.* Gaynard. V, N. S. 248.

SIXTH District.

Decreed, that parol evidence must not go to the jury of an amount of debts, ascertained by notes and receipts neither produced nor accounted for; nor of the conversation of the plaintiff tending to establish the sale of a slave, or of what he said at the time he signed a receipt.

Bray *v.* Cumming. V, N. S. 252.

Where the title of slaves, alleged to be given by the father to the son-in-law, in consideration of marriage, is at issue, declarations of the wife are not good evidence.

If the party claims under the laws of another state, and fails to prove them, the case will be decided by those of our own.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

This is an action of trespass for taking two of the plaintiff's slaves. The defendants severed in their answers. Cumming pleaded title in himself and prescription. Russel pleaded the general issue and justification, averring that, as a constable, he assisted Cumming in a search warrant issued for the slaves.

The plaintiff had judgment, and the defendant, Cumming, appealed.

The evidence shows that on the marriage of Cumming with the plaintiff's daughter, in the state of Mississippi, two slaves, the issue of a negro woman possessed by the plaintiff, accompanied her to her husband's. Afterwards the plaintiff, and Cumming and his wife, came to Louisiana, bringing the two slaves, who remained with him till her death, when they went to the plaintiff's. The plaintiff gave in these two slaves as his property and paid their taxes. Cumming was heard to say that he did not pay their taxes, because the plaintiff had never given him a title. He married the plaintiff's daughter in 1816: they came over the same year, and she died in April 1825.

[Bray v. Cumming *et al.*]

A witness deposed, he bought slaves in the state of Mississippi without bills of sale. The clerk of the court told him none was necessary. Another deposed, he sold about forty slaves in that state; written sales were necessary, but they needed not to be recorded; he had always understood that a gift of negroes, on marriage, was not required by law to be written. He had, himself, some property in Natchez in that situation, and inquired of a lawyer, who said the title was good, but the witness knows not the law of the state of Mississippi.

The plaintiff proved his daughter was heard to say the slaves were not given her.

To the admission of evidence of what the wife had been heard to say, the defendant excepted, and we think the court erred in overruling his objection, for hearsay is no evidence, except as to what is said by a party to the suit.

He offered a witness to prove that the plaintiff had said he had given the slaves to his daughter—the plaintiff's counsel objected to this, but the court sustained the objection on the ground that the defendant had failed in the proof that a gift of slaves may be made by parol, in the state of Mississippi, and we do not think the court erred.

Leaving what the wife said out of the testimony, the plaintiff has shown the negroes were his, and the defendant has not proved that the title to them passed out of him: as he claims without a good title, the prescription of fifteen years can alone help him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Bullard, for the plaintiff.

Scott, for the defendant.

Tanner *v.* Robert. V, N. S. 255.

If a widow renounces her rights under a will in the idea that she is entitled to one half of it in her own right, and it afterwards appears she was in error as to the extent of her claim, the renunciation will not bind her.

COURT of Probates of the Parish of Rapides.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff claims property as the heir of his deceased child, and prays that a partition may be made between him and the children of his late wife, by a former husband. The judge of probates, made a decree, by which he considered all the estate left at the death of the former husband as belonging to the community which existed between them; and which ought to have been equally divided and partitioned between the widow and the heirs of her first husband. From this judgment the defendant appealed.

The evidence of the cause which comes up on the record, shows that the mother of the deceased child, under whom the appellee claims as heir, was married to Grimbal Robert, in the state of South Carolina, by whom she had issue two children; that after the death of Robert, she was lawfully married to the plaintiff, and had by him one child, and subsequently died, leaving the child alive, which died previous to the commencement of the present action. It is also in proof that, at the time of the marriage in South Carolina, the widow of Robert, and late wife of Tanner, was owner of certain slaves, which, with their increase, were found among the property held by her former husband. Ten witnesses proved that, according to the laws of that state, slaves are viewed as personal property, and are acquired *ipso facto* on marriage by the husband. The only property acquired by Robert and his wife during their coverture, and whilst they lived together in this state to which they removed, was a tract of land paid for entirely out of the funds of the husband. Robert made an olographic will, by which he left to his wife a specific legacy, consisting of certain slaves therein named; some of which, if not the whole, were those which he had acquired by marriage with her in South Carolina. By this will he also bequeaths to her one half of his estate. Subsequent to his death, the widow caused an inventory to be made of all the property which he held during his lifetime, and claimed in that proceeding as her own, the slaves which she had brought in marriage, and which had been bequeathed to her by the will of her husband, as above stated. It is proved that nothing was gained during the marriage whilst the husband and wife lived in this

state. After all these proceedings, some heirs of Grimbal Robert, children of a former bed or marriage, appeared and claimed their portions of their father's estate, and to them the widow relinquished all the property which belonged to that estate, on condition that her two children by Robert, should share and partake one-fourth part thereof. This is a summary of the important facts of the case, from which the legal rights of the parties litigant are to be deduced.

According to the laws of South Carolina proved, the slaves which the wife owned before marriage, and all personal property which she acquired afterwards, vested in full right in her husband, as a consequence of the matrimonial union. The land purchased by him in this state, and paid for out of his own funds, became exclusively his. In truth, the evidence shows that at his death, nothing existed which could form a community of acquests and gains; we are, therefore, of opinion that the judge *a quo* erred in considering all the property left by Robert at his decease, as belonging to a community existing between his heirs and his surviving wife. It is true, that agreeably to the provisions of our laws, marriage superinduces a community of acquests and gains between husband and wife; and that all the property left at the death of either party, is presumed to constitute such community. But this presumption, like all legal presumptions, falls before proof to the contrary; *stabit presumptio donec contrarium probetur.* And in the present case we have proof to the contrary, showing that all the estate belonged to Robert the husband.

From this view of the case, we are necessarily led to the consideration of the will, inventory and agreement, by which the widow settled the affairs of her deceased husband's estate, with his heirs. The will, we think, is good and valid in point of form and probate; and transferred in fee simple all the disposable portion of the testator's succession: but as he had forced heirs at the time his estate descended, he could only give by will, one-fifth part of his property to the prejudice of such heirs. As to the agreement, by which it is contended the widow gave up all her right in the succession of her husband; we are of opinion that it was made in relation to the will and inventory, and that in endeavoring to find out the intention of the parties to that contract, these instruments must be taken into consideration. The will gives to the widow specific property by one clause, and by another one-half of the estate of the testator; when the inventory was made by the legatee, she claimed as her own, all the property which constituted the specific legacy, causing all the rest to be inventoried as the estate of her late husband, one half of which she might have thought herself entitled to under his will: and this alone, we believe, she intended to surrender by the agreement entered into between her and the heirs of her husband proceeding from a former marriage. But it may be said, that as she could not acquire under the will more than one fifth of the testator's succession, it is that alone on which the agreement operated, and was thereby transferred; this cannot be supposed,

unless it be admitted that the widow intended to strip herself of every atom of property, and that with a view of her children enjoying only one-fourth part of it, a supposition too absurd to be tolerated. The agreement was made in error of the legal rights of the parties, and really transferred none from the legatee; but left the estate of the testator to be partaken according to law, except, perhaps, a small advantage to her children.

It is, therefore, ordered, adjudicated and decreed, that the judgment of the court of probates be avoided, reversed and annulled: and it is further ordered, &c. that the cause be sent back to the court below, with instructions to the judge to cause a partition to be made in such a manner as to allow to the plaintiff, as heir of the deceased child, one-third of his late wife's estate, as derived from the former husband; that is to say, one-fifth part of his succession.

EASTERN DISTRICT, NOVEMBER TERM, 1826.

Thompson *v.* Linton *et al.* V, N. S. 261.

When distinct claims against distinct defendants, are presented together to a jury, and they find generally, the verdict will be set aside.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff states that the defendants (Linton, Brower & Lewis) and others, entered into an agreement with the plaintiff, whereby they were to furnish a boat or boats for the piloting business: and that the earnings of said boat should be divided as follows: two-fifths thereof by the owners of the boats, and three-fifths by the pilots; and that the plaintiff, who was to be the agent, should receive 5 per cent. on all moneys collected—2½ per cent. on all advances—and 1½ on all purchases. The defendants, and the other parties to the agreement, (Lightburn, Prince & M'Donald,) promised to forward to him all the bills to be, and all the moneys, collected.

That, in pursuance of said agreement, the plaintiff, the defendant Linton, and one Hollman, purchased a boat, for which they paid 1700 dollars; and the defendant Linton (a commissioned pilot) took possession of the said boat, and with the other two defendants, his under pilots, has ever since used and employed her in piloting vessels. Yet they never transmitted to the plaintiff any bill to be, or any money, collected; and have employed other persons to make the necessary purchases.

[Thompson v. Linton *et al.*]

The petition concludes with a prayer, that the defendants may account; and that they may be decreed to pay one-third of two-fifths of the earnings; five per cent. on all the moneys collected; and one and a half per cent. on the purchases—or damages.

Farther, that the partnership in the boat, between Linton, the plaintiff and Hollman may be dissolved, the boat sold, and that Hollman be cited; and that he and Linton may render an account of, and pay the plaintiff his share of the profits.

Linton, Lewis & Co., filed an answer, avering that they employed the plaintiff in the agency for no definite time; that he rendered false and fraudulent accounts, and they discharged him; that they had advanced him more money than he lent for them.

Linton and Hollman answered they could not be sued for a dissolution of the partnership between the plaintiff and them in the same suit, in which he claims damages from Linton, Lewis & Brower; that the plaintiff and they are under a contract with Lewis, that the boat shall be employed during eighteen months in piloting, &c.

With leave, the suit was discontinued as to Hollman.

The jury found a verdict for the plaintiff, and assessed his damages to 1566 dollars and 66 cents; and he had judgment accordingly.

The defendants appealed.

It does not appear that the inferior courts gave any judgment on the plea in abatement of Linton, in regard to the claim of the plaintiff, relating to the boat purchased by the latter, and Linton & Hollman.

For any thing that appears on the record, the damages given are compounded of those claimed against Linton, Brower & Lewis; and those claimed of Linton, in the connection that subsisted between the plaintiff and Hollman. The whole matters in the petition, in regard to two distinct transactions, and between two different set of contracting parties, appear to have been submitted to the jury—whether they assessed damages on both claims, and on which, if one only was considered, is a matter of doubt. But the defendants, Brower and Lewis, are utter strangers to the part of the plaintiff's complaint, resulting from the conduct of his copartners in the purchase of the boat.

The defendant Linton, has a right to know the amount of damages he is mulcted with, either in both, or either of the claims of the plaintiff; and the other defendants must not be left in doubt whether they be not charged with a part of the plaintiff's demand against Linton.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; the verdict set aside; and the case remanded, with instructions to the judge to grant judgment on the plea of abatement, and proceed afterwards according to law; and it is ordered, that the plaintiff and appellee pay costs in this court.

Pierce, for the plaintiff.

Preston, for the defendants.

Wakeman *v.* Marquand *et al.* V, N. S. 265.

A verdict will not be set aside, because the jury took depositions with them into the jury room.

And that, although part of them were legal evidence, and part were not.

Whether the printed statutes of another state, are evidence: *Quære.*

But they are, when the copy introduced has been sent by the executive of the state where they were passed to the governor of this.

The common law of a sister state, may be proved by parol.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action on an open account, which is composed of various items for cash lent, stock sold, and the balance of an interest account. The amount due is stated to be 4,536 dollars 58 cents.

The petition was served on Paulding alone, who pleaded the general issue; and to that defence added an allegation, that the claim was false and fraudulent, and made in combination with his partner Marquand, the other defendant on record.

The cause was submitted to a jury, who found a verdict in favor of the plaintiff, for 3,520 dollars 21 cents; and from the judgment rendered in conformity therewith, the defendant appealed.

There was an application in the court below for a new trial, which was refused.

In this court, three grounds have been relied on, to obtain a reversal of the judgment of that of the first instance.

First. That there was error in permitting the jury to carry with them, when they retired to consider of their verdict, certain written depositions taken in the cause, and an account signed by Marquand; though the court had previously decided that part of these depositions, and the acknowledgment at the bottom of the account were not evidence against Paulding, the real defendant.

Secondly. That the printed statutes of New York, were not legal evidence to prove the rate of interest in that state.

Thirdly and lastly. That the verdict is contrary to law and evidence.

I. In relation to that part of the first ground, which alleges as error, the permission given to the jury to take with them the account signed by Marquand, we have had no difficulty. That acconnt was annexed to, and made part of the petition; as part of the pleadings, therefore, it was correctly entrusted to the jury; and the circumstance of there being an acknowledgment at the bottom, which the judge had declared

was not evidence, would not have authorised him to withhold from the jury the whole of the petition. The Code of Practice, though it does not explicitly mention that the jury are to take the pleadings with them, evidently contemplates they should; for it states, that the foreman is to write his verdict on the back of the petition, and that as soon as he has done so, notice is to be given to the court, if in session, that the jury are ready to give their verdict. Code of Practice, art. 522 and 518.

The permission accorded to the jury to take out with them depositions, part of which were, and part were not legal evidence, is not so clearly correct as that given in relation to the account which made part of the pleadings. In that country where the trial by jury originated, there was much strictness in regard to the jury taking out papers not under seal, which were read in evidence; and their doing so without leave, was in all cases considered a great contempt of the court, and in some instances held to be a sufficient cause for setting aside the verdict. In modern times, there has been a great, and, we think, a wise relaxation in the practice. We have found, however, no case where depositions are permitted to be handed to the jury; and the reason of this exception we presume to be, that it would be giving the party, whose testimony was reduced to writing, an advantage over the adversary who had given oral testimony, by enabling the jury to peruse the one in their retirement, and compel them to depend on their memory for the other.

In this state, however, where the whole of the testimony is generally reduced to writing, as was done in the case before us, this inequality does not exist; and it is most probable that it is owing to this circumstance, that the practice has been introduced among us, to permit the jury to take with them the evidence. We think it a good one—that it tends to facilitate the investigation of the case; and we do not feel inclined to disturb it. It is true, the court should not, if possible, permit any thing but legal evidence to be taken out: but when a great part of the depositions are legal proof, and part are not, there is considerable difficulty in carrying this rule strictly into effect. The course which presents the least inconvenience, we think, is to let the jury have the whole, under the direction of the court as it was given here; that the parts objected to, were not to be taken into their consideration. It cannot be presumed they would violate this direction; and if they did, the party is always safe in the power which the court possesses to set aside the verdict, and grant a new trial. In the simple state of society which existed when the rule was established in the common law, the cases presented to a jury were of such a nature as did not require them to take documents with them. Such evidence was, indeed, rarely produced. Men's rights depended almost entirely on oral evidence: but, at the present day, when the diffusion of education, the extension of commerce, and the complex transactions of men, have introduced a quite different state of things—a different rule is indispensable to the administration of justice. It is not long

since a case was before this court, which had occupied the attention of a jury for six weeks, where the whole transactions of a commercial partnership were required to be examined, and all the books were given in evidence. No human memory could have preserved a recollection of the testimony, nor could any judgment have been safely given without an opportunity being afforded to the jury to take the evidence with them in their retirement, and there to satisfy their doubts, by repeated perusals of it. Co. Litt. 227, 6; 1 *Trials per pais*, 257; Salkeld, 345; 6 Bac. Ab. 669; 7 *Ibid.* 9 and 10; 5 Binney, 238; Caulkey *v.* Banks, 3 *N. S.* 532.

II. We do not think the judge below erred in admitting the printed statutes of New York in evidence. The question has been decided differently in several of our sister states. In Vermont, Pennsylvania and North Carolina, they have been received. In Connecticut, and the circuit court of the United States for the state of Pennsylvania, a contrary rule has been established: and in North Carolina, they have lately, in opposition to the earlier decisions of their courts, refused to receive the printed statutes of another state, as evidence. It is certainly a great relaxation of the strict rules of evidence, to admit them as proof. Courts of one state cannot judicially know any thing of the authenticity of a book which purports to be the statute of another state; and there is no inconsiderable danger in some instances, that they might be intercalated to serve the necessities of the case. We are not, therefore, prepared to say that the printed statutes of another state, unaccompanied by any evidence to establish their genuineness, are legal evidence. But this case stands on particular grounds. The book introduced, was brought from the office of the secretary of this state, and it was proved to have been sent from the executive of New York to that of this state. This circumstance greatly diminishes the objection to its introduction, and we think it was properly admitted as *prima facie* evidence. 2 Haywood, 173; 1 Dallas, 462; 1 Chip. Rep. 303; 1 Peters, 352; 2 Root, 250.

III. The last question is on the merits. The principal error alleged is the allowing interest when none was legally proved to be due. The judge was of that opinion, though he afterwards refused to set aside the verdict by which the defendant alleges that the sum charged in the account on that head was allowed. The charge of the judge was correct on the evidence admitted by him; but he erred in refusing the plaintiffs permission to prove by parol evidence that, according to the common law, and usage and custom of merchants of New York, interest was demandable on an open account, from the time it became due. The distinction between the proof necessary to establish the existence of written and unwritten laws, is perfectly settled; and parol evidence is the best than can be offered of the latter. But it is unnecessary to remand the cause on that ground. The whole account was acknowledged to be correct; and there are enough of items in it, independent of the interest to support the verdict. The defendant has, however, urged that there is not a suffi-

cient amount, when the credits given in the account are deducted. This is, perhaps, true; but if he relies on a document introduced by the plaintiff to establish his defence, he must take it altogether, and this would sustain the claim for interest. Civil Code, 2244; 2 Starkie, 47.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Morse, for the plaintiff.

Hennen, for the defendants.

Philpot *v.* Patterson. V, N. S. 273.

PARISH Court of New Orleans.

In a suit by one partner against another for a dissolution and settlement, to which the defendant consents, the referees may adjudge that the expenses and costs should be paid out of the common stock.

Martial *v.* Cotterel. V, N. S. 274.

An agent is a competent witness, in all matters connected with his agency, without a release.

A witness whose interest is equal, is competent.

And his being liable for costs, will not render him incompetent, if he is at the same time agent.

If A lends B money, by giving an order on C, and it is accepted, but the money not paid, the funds become the property of B, and in the case of his death and insolvency, they cannot be claimed as the specific property of A.

COURT of Probates of New Orleans.

[Martial v. Cotterel.]

PORTER, J., delivered the opinion of the court.

The petitioner states that he was in habits of great intimacy with the deceased, and that knowing his pecuniary wants, he frequently lent him money. That, in the year 1824, the plaintiff being about to leave this state, and having a certain sum of money in the hands of L. & M. Commagere, of the city of New Orleans, gave authority to the deceased to draw on them for the sum of 3000 dollars.

That, with the same view, the petitioner authorised him to receive from others of his debtors, the sum of 959 dollars, 87 cents; that he did in his lifetime receive that sum, together with the 3000 dollars, due by L. & M. Commagere; and that the sum of 40 dollars, was paid by the petitioner for medical attendance on the deceased.

That the money due by Commagere was left in their hands by Fontenay, who took their note for the same, and that this note exists in kind.

That the defendant, representative of the estate, refuses to acknowledge the justice of these claims, or to give up the note.

Judgment is prayed for the money received, and for the note, or the amount thereof.

The answer consists of the general issue, and an averment that the note belonged to the estate of Fontenay; and that suit had already been commenced against the makers in the district court.

On this issue the parties went to trial in the inferior court, and the judge below decided that the plaintiff should receive the money claimed in the petition, except that alleged to have been lent through the hands of Commagere.

The petitioner appealed.

Before the merits can be gone into, there are two bills of exceptions to be disposed of.

The first is to an opinion of the judge permitting the agent of the plaintiff, who had received a note for collection, and had collected it, to testify that he had paid the amount over to the defendant.

The court below did not err. An agent* is a competent witness in relation to all matters done in the usual course of business, without a release. There is no rule of evidence better established, and it has been more than once recognised and acted on by this court. 2 Starkie, 764, 768; 4 *N. S.* 184; 4 *N. S.* 335.

The second was to the admission of Commagere, the maker of the note. The general rule on this subject is, that when the witness is equally responsible to either of the parties, he is competent to testify between them; but that where the opposite interests are unequal, the witness has an interest on one side, measured by the excess of the one over the other. The defendant insists the witness admitted here fell within the principle last stated, because though equally liable to either plaintiff or defendant for the amount of the note; yet as he

* See Bank of United States v. Johnson, *post* 310, for a final settlement of this point by PORTER, J.

had been already sued by the latter, he was interested to defeat that action, in order to avoid the costs. 2 Stark. 752.

There is an exception to the rule just stated, where the witness who is responsible for the costs, is at the same time agent of the party calling him. Commagere stood in that relation to the plaintiff, and was correctly permitted to testify. There is one other ground on which he was properly received. This action is not for the note alone, but for the note, or its amount. Now for the latter purpose he was competent; because if his testimony enabled the plaintiff to recover the amount of the note from the defendant, of course the defendant would have a right to recover it from the witness. In point of fact, therefore, the witness was not interested in the costs, as, whether the plaintiff or defendant succeeded, judgment must be given against him in the suit commenced by the latter. 7 T. Rep. 480; 2 East, 458.

On the merits, we are of opinion, the judge *a quo* erred. We have considerable reluctance to put our opinion in opposition to that of the court of the first instance, in matters of fact; but in this case, the weight of evidence appears to us conclusively with the plaintiff. Two witnesses swear positively, that the money was given as a loan. It is admitted on the record, that another who was absent from indisposition, would prove the same fact. Nothing in the evidence goes to contradict their proof; on the contrary, the situation of the deceased, and the relation in which he stood to the plaintiff, repel the idea that the plaintiff was indebted to the defendant in so large a sum. We see no middle course between giving judgment for the plaintiff, or declaring the witnesses perjured; for they explicitly state the money was lent.

But we do not think the plaintiff has established any specific right to the note. From the time the mandate of the plaintiff was accepted, and an agreement made to leave the money in the hands of the maker of the note, or a promise to pay interest, the money ceased to belong to the plaintiff, and became that of the deceased—the debt was due to him, and from him to the plaintiff.

It is, therefore, ordered, adjudged and decreed, that the judgment of the probate court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the estate of Theodore Fontenay, deceased, 3999 dollars and 87 cents, to be paid by the defendant, curator thereof, in concurrence with the other creditors of said estate, and according to its rank and privilege, with costs in both courts.

Deny, for the plaintiff.

De Armas and *Trabue*, for the defendant.

Griffon *v.* Mayor *et al.* V, N. S. 279.

If the farmer of the city revenue has notice, at the time of adjudication, that an ordinance then in its passage in the city council, if passed into a law, is to form a part of the conditions of the contract, he cannot resist its effect, on the ground that it was not a law at the time that he contracted.

Selling flour by the barrel, or bacon by the single ham, on the levee, is selling by retail.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The petition states that on the 25th of March, 1824, the farm of certain duties, to be collected on the wharfage of flatboats and others, was adjudicated to the plaintiff, for one year—during which, contrary to the custom, and in violation of the plaintiff's rights, several owners of boats have been threatened and harassed by prosecutions by one of the officers of the corporation, for selling flour by the single barrel and hams by the piece, whereby a number of owners of boats have been deterred from remaining along the levee, as they did before, and the plaintiff has been deprived of a large sum of money, which he would have otherwise collected under the adjudication of the same; and that he is entitled to damages.

The general issue was pleaded, the defendants had a verdict and judgment, and the plaintiff appealed.

At the trial, the defendants offered in evidence an ordinance of the city council, which had passed that body on the 23d of March 1824, and was read to the bidders before the adjudication, and referred to in the plaintiff's deed on the 25th, but which did not receive the approbation of the mayor until the 27th, the object of which was to restrain the sales by retail on board of boats along the levee. The plaintiff objected to this piece of evidence, on the ground that the document was only inchoate and had not received its perfection, at the time of the adjudication; and the corporation could not, by an act of theirs posterior to the adjudication, derogate from the rights acquired by the plaintiff by his bargain with them.

We think the plaintiff having been informed, by the reading to the bidders and the reference in his deed, that the intended restriction was contemplated, and the ordinance establishing it on its way, he took the chance of its ultimate fate, and could not afterwards complain, if the ordinance became binding by the signature of the mayor. The judge acted correctly in admitting it.

The plaintiff excepted also to a part of the charge, in which the

judge told the jury that "there is no doubt that selling by the barrel or by the ham, is selling by retail."

It does not appear to us the judge erred. The object of the ordinance was to prevent the levee from being obstructed by boats tarrying till a cargo of flour and hams was sold off by the single barrel and ham. Surely a boat load of hams must be said to be retailed when sold by the single ham.

We conclude, the plaintiff having had full notice of the passage of the ordinance by the council, although he sustained a loss by its becoming binding by the signature of the mayor, received no injury. No forced interpretation was given to the prohibition to retail, when it was extended to prevent the disposal of a cargo of flour and hams by the single barrel or ham, although, heretofore, flour and hams might be sold in the boats by the pound or a less quantity.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Derbigny, for the plaintiff.

Moreau, for the defendant.

Castleman *v.* Stone. V, N. S. 282.

FIRST District.

In this case the Court said:—On the trial, the plaintiff took a bill of exceptions to the decision of the court, permitting the deposition of Phillips, who is stated in the petition to be a partner of the defendant's, to be read in evidence.

We do not see how this objection could be taken by the plaintiff, as it appears by the return of the *dedimus*, that the witness was called before the commissioners, and sworn and examined on the part of the petitioner. But admitting that we could, we do not think it tenable. The parties were partners for buying and selling negroes. This is not a commercial, but a particular partnership, in which the partners are not bound *in solido;* and where, consequently, the interest which one of them has, in an action against the other, goes only to his credit, and not to his competency: for he can neither gain nor lose by the event of the suit, and the verdict could not be given in evidence either for or against him.

The plaintiff also objected to reading part of a deposition, in which

certain conversations of the defendant were related. The court permitted it to be read; but, accompanied this permission with a declaration, that these declarations were immaterial. The more correct course would have been to have ordered them to be stricken out; but this error can work no injury to the plaintiff, as we shall not permit them to enter into our consideration, in examining the merits.

The evidence leaves the case doubtful; but does not so preponderate as to authorise us to reverse the decision of the court of the first instance.

The person who is alleged to be the partner, swears positively that the slave was placed in his hands to be sold by him; and that he sold the slave, not as the partner of the defendant, but as the friend of the plaintiff, and without charging commission. This statement is somewhat shaken by the circumstances of the witness having made a bill of sale in the name of the partnership, and taken a note payable to them for the price. But the character of the witness is unimpeached; he swears directly against his own interest, and the burthen of making the case clear was on the plaintiff. We, therefore, are of opinion the judgment of the court below should be affirmed, with costs.

Preston, for the plaintiff.

M'Caleb, for the defendant.

Elliott *v.* Cox. V, N. S. 285.

The surety on an injunction bond cannot resist payment on the ground that the plaintiff did not record his judgment.

An *alias fi. fa.* does not operate a discontinuance of the original writ of execution.

The estimation of property seized in execution, does not preclude the creditor from showing its real value in a suit against the surety.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The defendant, sued as the surety on a bond for obtaining an injunction, which was afterwards dissolved, denied that any thing occurred as a breach of the condition; and averred that if any thing did, the loss was sustained by the plaintiff's own neglect, who is

thereby disabled from subrogating the defendant to the plaintiff's rights, mortgages and privileges.

The plaintiff had judgment, and the defendant appealed.

His counsel urges that the surety is in this case discharged, because "by the act of the creditor the subrogation to his rights, mortgages and privileges, can no longer be operated in favor of the surety." Civil Code, 432, art. 22; New Code, 3030.

This is contended to be the case, because,

1. The plaintiff neglected to record his judgment.

2. The *fieri facias* stayed by the injunction, was a lien or privilege on the personal estate of the principal, which the injunction did not destroy, although it suspended the sale. This lien or privilege was lost by the act of the plaintiff in discontinuing the first *fieri facias* by suing out a new one or *alias*.

We do not think that the surety may, in this case, avail himself of the plaintiff's neglect to record his judgment, because the former interfered, or assisted the principal in interfering with the sale, at a period when the plaintiff had not acquired the lien or privilege the registry might have given.

Neither can we imagine that by an *alias*, or *pluries fieri facias*, the first suit is discontinued—if any property has been seized under it, the seizure may take place without the *alias* issuing, and we cannot see how the *alias* may prevent it—the *alias* are used to authorise the seizure of other property, when that originally seized proves insufficient. Neither the *alias* nor the *pluries* affect any right acquired by the plaintiff under the original *fieri facias*.

The record shows the seizure of the plaintiff's house and lots, of sufficient value to satisfy the plaintiff; the dissolution of the injunction, on the issuing which the surety was bound; and that finally, the United States absorbed all the principal's property, so that the plaintiff can no longer expect payment, except from the surety.

Our attention is drawn to a bill of exceptions taken by the surety's counsel, to the opinion of the court, admitting parol evidence of the value of the house and lot seized, and of the possession of several slaves by the principal.

The evidence offered of the value of the property, is opposed as contradicting the appraisement subsequent to the seizure. As this appraisement would not be binding on the surety, we think he cannot avail himself of it, in such a manner as to preclude the plaintiff from showing it was too low.

The evidence of the possession of several slaves, is opposed as irrelevant. The case was not tried by a jury, and if the evidence be really irrelevant, we need not be bound by it; it would be a waste of time and money to remand the case for a new trial without this evidence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Preston, for the plaintiff.

Strawbridge, for the defendant.

EASTERN DISTRICT, DEC. TERM, 1826.

Nelson *v.* Louisiana Insurance Company.
V, N. S. 289.

The insured is not obliged to communicate a fact respecting the situation of the port of destination, in relation to pilotage, for example, the knowledge of which was equally within the reach of the insurer.

Whether an article be perishable in its nature, or not, is to be ascertained by the usage and custom of the port where the goods are shipped.

The particular enumeration of perishable articles in an ordinary policy does not prevent the insured from showing, under the general clause, that other articles are perishable.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This is a suit brought on a valued policy of insurance, by which the defendants insured 2500 dollars worth of merchandise on board the schooner called the Sterling, at and from New Orleans to Xibara, and two other ports in the island of Cuba. The policy is made in the usual form of such instruments, and contains a memorandum by which a number of articles of merchandise are specially excluded from average, except general; concluding by an exception, which, in its terms, embraces all articles perishable in their own nature.

The answer contains a general denial of responsibility on the part of the insurers, and also an averment that they are released from any obligation to make good to the assured the alleged loss, on account

of misconduct of the master of the vessel, in attempting to enter the port of destination without the aid of a pilot, or any other proper person on board.

On these pleadings, and the evidence in the cause admitted and rejected by the court below, two questions are raised for the consideration of this court:—Whether there was any improper concealment by the plaintiff in relation to the manner in which vessels entered the port of Xibara, in not stating to the defendants, that there were no pilots belonging to that port, and that it was customary for masters to conduct in their vessels without assistance from any other person?

II. Whether the petition and answer considered in relation to the policy itself, the primary evidence of the cause, authorised the interrogatory put by the counsel for the defendants, to a witness introduced by the plaintiff, by which it was asked whether flour, which appears to have composed the principal part of her cargo insured, was an article perishable in its own nature? In the course of the trial of the cause, this interrogatory was propounded to a witness on the part of the defendants, (who are here appellants,) which the judge *a quo* would not suffer to be answered, and a bill of exceptions was taken to his opinion, refusing to authorise an answer.

As to the first of the questions, we are clearly of opinion that there was no fraudulent concealment by the insured at the time of obtaining the policy, which is legally destructive of the force and effect of that instrument. The situation of the port to which the schooner was destined, in relation to pilotage, is a matter in its own nature, the knowledge of which was equal in facility of acquirement to both parties to the contract; it is a matter which both might be fairly presumed equally to know. See Park on Ins. p. 185 and 186, and Phil. p. 85.

The propriety of the opinion of the judge below, by which he refused to admit evidence to prove that the cargo insured was composed of articles perishable in their own nature, is attempted to be supported on two grounds:—First, That no proof of that fact could legally be allowed, because it was not specially pleaded in the answer, &c.; and, secondly, that the interrogatory was too indefinite, as it did not limit the answer to perishableness, according to the custom of this port of New Orleans, in relation to articles ordinarily exported.

The merit of these grounds is wholly technical, and is inconsistent with that simplicity of practice established by law for our courts in all cases, and would be peculiarly severe in the present; as the question was put to the witness in strict pursuance of the clause used in the memorandum of the policy, which was evidently introduced with the intention of influencing the contract of the parties.

Whether the general exception contained in the memorandum of the policy of insurance now under consideration, which, after a specific enumeration of many articles, excuses the insurers from contribution on average unless general—or in other words, from remune-

ration for a partial loss on all articles perishable in their own nature, must be interpreted according to the particualr usage and custom of this port in relation to exports, or according to the sense and meaning generally recognised by merchants and traders, is a question which would most properly occur, after first ascertaining by testimony, whether the articles thus alleged by the defendant to be perishable in their own nature, are really such or not, according to the opinions, knowledge and belief of men skilled in matters of this kind.

By inserting the clause above stated, after a long list of enumerated articles, the rule of interpretation that *expressio unius est exclusio alterius*, is completely destroyed; unless it be considered that such a clause in policies is wholly vain, nugatory and without sense and meaning; which would be in direct opposition to a sound and general rule of interpretation, which requires that every clause and expression in a law or a contract, is entitled to its full weight and effect; unless such interpretation lead to absurd results. We have been induced to make these remarks on two very plain and well known rules of construction, in consequence of some observations found in Phillips on Insurance, relative to the general provision usually inserted in the memorandums of policies, (to which the counsel for the plaintiff here referred us,) and wherein the author states that he has not met with any decision, in which the exception has been held in virtue of this general clause, to be applicable to an article not specifically named in the policy. See Phil. on Ins. p. 492.

To allow an inquiry in all cases, as to the nature of articles not enumerated, would certainly have a tendency to add to the difficulties which ordinarily occur in suits on contracts of insurance; but the apprehension or fear of that evil will not authorise courts of justice peremptorily to debar such an inquiry, in violation of well established rules for the interpretation of contracts in general, unless it be clearly shown that those of insurance form an exception.

Being of opinion that the judge *a quo* erred in refusing to admit testimony on the part of the defendants, to show that flour is an article perishable in its own nature; because, we believe, such testimony to be generally admissible, according to the terms of the contract on which the action is founded:

It is ordered, adjudged and decreed, that the judgment of the disrict court be annulled, avoided and reversed. And it is further ordered, &c., that the cause be remanded, with instructions to the court below, to allow the defendant to prove by legal testimony, whether or not flour be an article perishable in its own nature; and that the plaintiff and appellee pay the costs of this appeal.

Carleton and *Lockett*, for appellee.

Grymes, for appellant.

EASTERN DISTRICT, JANUARY TERM, 1827.

Taylor *v.* Hollander. V, N. S. 295.

In an action against one executor of an estate, a co-executor may be called as a witness by the plaintiff.

So if he has been discharged from his office he is a good witness.

If an executor who has become insolvent, is sued in the court of probates for notes and obligations belonging to the estate, and it appears he has transferred them, the cause must be cumulated with the proceedings in the *concurso*.

COURT of Probates of New Orleans.

PORTER, J., delivered the opinion of the court.

This case has been already before the court, and was remanded for further proceedings. 4 *N. S.* 535.

On its return to the court of probates, an examination of the merits was gone into, and it appearing to the judge below that the notes and other specific property claimed in the petition, had been alienated and transferred before the commencement of the suit, he gave judgment of nonsuit against the plaintiff, and from that judgment this appeal has been taken.

Before the correctness of this opinion can be inquired into, it becomes necessary to examine the propriety of a decision of the judge *a quo*, on the trial, which is presented to our consideration by a bill of exceptions.

By this decision the judge overruled an objection taken by the defendant, that Shepherd, one of the executors of the last will and testa-

ment of Harman, was not a competent witness; and secondly, that no parol evidence could be given to show in what capacity the defendant received the notes, which form the subject of the present contest, as the receipt is signed by him in his individual character, without any addition thereto.

Whether Shepherd, at the time he was called on to testify, was, as the plaintiff contends, discharged from the office of executor, or whether he still continued to fulfil its duties, it appears to us the court below did not err. For, in the first hypothesis he had no interest in the event of the suit; and in the second, he had one opposed to the party calling him, as executors by our law are liable *in solido*, unless the testator himself has divided their functions, and each of them has confined himself to the duties allotted to him. Civil Code, 243, art. 177.

It is also our opinion, that the judge below did not err in permitting parol evidence to be received to show in what character the defendant had got these notes into his possession. The receipt purports, that they were received by the defendant on account of the estate of Thomas L. Harman, deceased. The documents prove that at the time they were delivered the defendant was executor of this estate. As the law raises a presumption that he took them in the only capacity in which he was authorised to receive them, and this presumption was, in some measure, opposed by his not adding the term executor to the receipt, there was such an ambiguity as could be properly removed by parol testimony; the only effect of which was to explain, and not to contradict.

On the merits, however, we think the judge decided correctly in favor of the defendant. The evidence showed that the note delivered to the executor had already been passed by him, and was no longer in his power; that it had become the property of a third party. The only judgment, then, which the court could have correctly given, was for its amount, and this, after the defendant had failed, could not be done in the court of probates; for as that judgment would have to be satisfied out of the moneys in the hands of the syndics, the amount due must be settled contradictorily with the other creditors.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, with costs.

Hennen and *Grymes*, for the plaintiff.

Pierce and *Eustis*, for the defendant.

Richards *v.* His Creditors. V, N. S. 298.

The loss of credit is a good cause for a debtor to obtain relief by a cession of his goods. Section of act of 1817, relative to production of books of insolvent, commented on.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

In this case opposition was made to the homologation of the proceedings, which took place before the notary, in pursuance of an order of the court below; founded on two grounds.

1. That the insolvent has not set forth any losses.
2. That he has not presented any books of accounts.

This opposition being overruled by the district court, the opposing creditor moved for a new trial, and having failed in that motion, took the present appeal.

We are of opinion that the judgment of the court below was correct in setting aside the opposition of the appellant, as not being supportable on the grounds by him assumed. It is true that the unfortunate debtor in his petition, alleges no loss except that of his credit, or confidence reposed in him by his mercantile friends: His whole capital seems to have been exclusively his credit or the faith which others had in his fidelity; which, although very unsubstantial, has often been productive of great gains, and is certainly considered by merchants as a very important means of operation.

The section of the act of 1817, which requires an insolvent to present his books of accounts, is applicable only to such persons as keep books of that kind, and who, from a multiplicity of business, must, of necessity, keep them. The commercial transactions of the plaintiff in the present case, appear to have been so limited, that they may have been placed in a fair and just light without the aid of books, or any great exertion of memory.

The affidavit of the opposing creditor in support of his motion for a new trial, as based on the discovery of new evidence, charges on the insolvent a crime of a very serious nature. It contains an accusation, which, considered solely in relation to the offence alleged, ought not lightly to be made, or lightly to be passed over when made; being nothing less than an accusation of forgery. But considered in relation to the opponent's application for a new trial, we are of opinion that it is entitled to little weight. The facts disclosed in the affidavit, are such as might have been discovered and the evidence to sustain them, by ordinary diligence on the part of the appellant, if he had

obeyed the summons which called the creditors together; and examined the schedule of the insolvent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Maybin, for the plaintiff.

Strawbridge, for the defendant.

Mathurin *v.* Livaudais. V, N. S. 301.

A bequest to a master of a slave, of a sum of money in payment of the slave, is not a *fidei commissum*, and therefore prohibited by law.

COURT of Probates of New Orleans.

PORTER, J., delivered the opinion of the court.

The question presented for decision in this case arises under the will of a free man of color, who, leaving one of his children a slave, made the following disposition of a part of his property:—

"*Comme mon fils Narcisse est encore esclave, et que je désire contribuer a lui assurer sa liberté, je donne et legue a son maitre, Mr. Charles Enoul Dugue Livaudais, une somme de six cents piastres, a la charge par lui de considerer ladite somme un acompte a valoir sur le prix qu'il pourra exiger de mon fils Narcisse, pour lui donner sa liberté en bonne forme.*"

"As my son Narcisse is yet a slave, and as I wish to contribute to his emancipation, I give as a legacy, to his master Mr. Charles Enoul Dugue Livaudais, a sum of six hundred dollars, on the condition that the said sum is to be considered by him as so much on account of the price which he may demand from my son Narcisse, to give him his liberty in proper form."

This disposition is attacked by a son of the testator and brother of the slave, who was to derive a benefit from the legacy, on the ground that it is a *fidei commissum*, and prohibited by law.

This is one of the harshest demands, and the most revolting to every principle of equity and justice that has, as yet, fallen under our consideration.

Nor do we think it supported by law. Our Code, it is true, declares that substitutions and *fidei commissa* are abolished. But the object of this change in our jurisprudence was, as it is well known, to prevent property from being tied up for a length of time in the hands of

individuals, and placed out of the reach of commerce. The framers of our Code, certainly never contemplated to abolish naked trusts, uncoupled with an interest, which were to be executed immediately. If they had, they would not have specially provided in a subsequent part of the work for testamentary executors, described their duties, and recognised the validity of their acts. The obligation imposed on the legatee by the will of the testator in this case, cannot be distinguished from that of an executor, except in the name; and it is the duty of the court to look to things, rather than to the words.

But the question does not require to be decided on this ground. By another provision of the Code, it is declared that slaves cannot dispose of or receive by donation *inter vivos* or *mortis causa*, unless they have been previously and expressly enfranchised agreeably to law. Civil Code, 208, art. 5.

Being thus made incapable of receiving, this legacy cannot be considered as a *fidei commissum*. It is not a charge to one to receive for, and render to another; because that other has not in the eye of the law a legal existence: until the slave is emancipated, he cannot demand the thing bequeathed.

It may be objected to this reasoning, that as the slave has a legal capacity to maintain an action for his freedom, he, of course, could have an action to enforce the application of the money left to another to purchase his freedom. But this right to sue for freedom is an exception from the general rule, and far from supposing any legal capacity to own or receive property in the slave, the object of the suit is to acquire it.

By the Roman law, a bequest of the kind now before us, was considered as a *fidei commissum*. We must guard, however, against adopting and applying rules of that jurisprudence which were introduced for the purpose of giving effect to last wills and testaments to cases, where under new statutory provisions these rules would defeat the will of the testator. This distinction has been taken in France, in the construction of that article of the Napoleon Code which abolishes substitutions; and the correctness and wisdom of it is placed beyond doubt by the decisions of their courts, and the able development given of the reasons for introducing such a distinction by their jurisconsults, particularly Merlin & Toullier. The last mentioned author states that it is the spirit of their law, and of their jurisprudence, not to annul a testamentary disposition made under the Code, except it necessarily presents a substitution, and cannot be supported and interpreted in any other manner. *Nouveau Repertoire, verbo Substitution, fidei commissaire, sect.* 8, *no.* 7; *Toullier*, 5 *N. S. lib.* 3, *tit.* 2, *cap.* 1, *no.* 10—50.

For the balance in the hands of the executor, the plaintiff has no claim. The amount is shown to be less than the sum which Rosette, one of the children deceased, is entitled to by the will.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, with costs.

Derbigny, for the defendant.

O'Brien *v.* Louisiana State Bank. V, N. S. 305.

The teller of a bank, who has overpaid a check, is a good witness without a release.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff and appellant complains that, having deposited in the defendant's banking house a sum of 1400 dollars, and procured from their teller a corresponding entry in his bank books, they now refuse to restore it, and their officer fraudulently struck out the entry and substituted one for a very trifling sum, viz: 55 dollars.

They pleaded the general issue, and averred the plaintiff had deposited the latter sum only, and the first entry was made through error and was afterwards corrected. They had a verdict and judgment, and the plaintiff appealed.

There is a bill of exceptions to the opinion of the inferior judge, admitting the testimony of the teller. It is urged that the release the defendants gave him was not under the seal of the bank, and that they released him from the consequences of his error, but not of his fraud.

We are of opinion no relief was necessary. This point was inquired into and disposed of in this court last year, in Jordan *v.* White, 4 *N. S.* 340. And we held that "agents and servants may be received as witnesses, for their principals and masters without a release of responsibility for apparent misconduct and negligence, and where the affairs conducted by them have been in the ordinary course of business. Starkie, in his admirable treatise on the Law of Evidence, has collected all the English authorities on this head, and in Metcalf's edition of that work, the American have been added. 2 Starkie on Evidence, 753.

The testimony fully establishes the averred mistake, and that another customer having at the same time deposited the large sum, the smaller was entered in his book, and the larger in the plaintiff's.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Hoffman, for the plaintiff.

Grymes, for the defendants.

Caldwell *v.* Townsend. V, N. S. 307.

Whether an attorney for an absent debtor can confess judgment. *Quære.*
The money in the garnishee's hands, cannot be taken from him before final judgment against the defendant in attachment.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The appeal is taken in this case from a decision of the judge *a quo* on a rule taken by the plaintiff on the garnishee, to show cause why judgment should not be rendered against the defendant. The court was of opinion that the garnishee was discharged by the answer which he had made to the interrogatories propounded to him. The correctness of this opinion, and the propriety of the judge refusing the plaintiff permission to obtain testimony from New York, to prove that there were funds in the hands of the garnishee, have been both discussed by the counsel, but we do not find it necessary to go into them; for we are of opinion that the cause is not before us in such a way as to authorise us to do so.

The garnishee is only responsible to the plaintiff in attachment, through the claim which he has enforced to judgment against the defendant in the cause, and no such judgment appears on record in this case.

There is an agreement which we presume was intended to have the effect of one, in the following words:—

"It is agreed in this case, that defendant's counsel shall permit the plaintiff to take a judgment according to the prayer of petitioner, upon the condition that the plaintiff will consent to open the judgment again, provided the defendant so wishes, and shall desire to have a regular trial of the case. And it is further agreed that any sum of money, in which the garnishee shall be adjudged to be indebted to the defendant, shall remain deposited in court, subject to any judgment to be rendered in the premises, either by consent or otherwise; and that said sum of money shall be subject to all the conditions above specified."

Admitting that an attorney of an absent debtor has power, under the appointment held from the court, to confess a judgment (which we strongly doubt) there is nothing in the agreement just set out, which can authorise the plaintiff to take out of the hands of the debtors of the defendant, the moneys due to him. It is not the judgment of the court, but an agreement that the plaintiffs should take one, and *non constat* that the court would have sanctioned by its

decree, such an agreement as the attorneys of the parties had entered into. Even if it had, the judgment would not have been final; for it expressly stipulates that the defendant shall hereafter have a regular trial on the merits, if he requires it.

On every point of view in which we can consider the cause, the appeal must be dismissed, with costs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be affirmed.

Maybin, for the plaintiff.

Conrad, for the defendant.

Grymes, for the garnishee.

United States Bank *v.* Johnson. V, N. S. 310.

The cashier of a bank who overpaid a check, is a good witness without a release, and so, universally of agents, in the ordinary course of their employment.

FIRST District.

PORTER, J., delivered the opinion of the court.

The only question which this case presents, arises out of a bill of exceptions taken on the trial in the court of the first instance.

The plaintiffs offered one of their clerks as a witness to prove that a check, which was drawn for 876 dollars, 29 cents, had been overpaid 1000 dollars, in consequence of the amount in figures being 1876 dollars, 29 cents; instead of 876 dollars, 29 cents, the sum in which it was filled up in the body of the check.

The competency of this witness has been contested in the argument, and though the question has been considered as settled by several decisions in this court, which cannot in principle be distinguished from that now before us, we have been induced to review them, in consequence of an authority produced by the defendant's counsel from a late work on evidence by Starkie, which enjoys, as it merits, a high reputation with the profession.

In the case of Butler *v.* De Hart, this court was of opinion, that in an action for the non-delivery of cotton, the consignee was a good witness. 1 *N. S.* 185.

In that of Robertson *v.* Nott, we decided that an agent through

whom a negotiation had been carried on between the plaintiff and defendant, was competent to testify for the former. 2 *N. S.* 122.

The same question arose in the case of Pratt *v.* Flower *et al.* A witness who had been intrusted with a note, and had received instructions to hand it over, was admitted to prove that he had complied with these instructions. *Ibid.* 334.

So in the case of Jordan *v.* White, it was held, that the mate of a vessel was a good witness in an action against the owners by the master, to prove or disprove negligence imputed to the latter. 4 *N. S.* 335.

The decisions were all made on a principle understood to be clearly settled in that jurisprudence from which we have taken our rules of evidence, that agents and servants were competent witnesses, although the regularity and correctness of their conduct were involved in the transaction on which they were called to give their testimony.

Phillips, in his treatise on Evidence, states "it may be laid down as a general rule, that executors in trust, trustees and agents, are not incompetent merely on the ground of their liability to action." Phillips on Ev., ed. 1820, 42.

Again. "On the same principle of convenience, it is the common practice to admit servants and agents without a release, to prove the payment or receipt of money, or the delivery of goods on behalf of their masters or principal, though their evidence tends to discharge themselves." *Ibid.* 100.

For this doctrine a great variety of authorities are cited, drawn from as high a source, as any known to the laws of the country on which he writes.

To the same effect is Starkie, whose work is relied on to show the incompetency of the witness.

He states "upon the ground that (of necessity and public convenience) it is the constant course to admit the servant of a tradesman to prove the delivery of goods, and the payment of money, without any release from the master."

"So it has been held that an apprentice is a competent witness to prove that money has been overpaid by his master." So in an action against a carrier for not delivering a parcel, his servant was held to be competent to prove the delivery. And in an action by the party robbed against the hundred, he is a competent witness as to the fact of the robbery, although he is not only interested, but the plaintiff in the suit." Starkie on Evidence, part 4, 754.

In a subsequent part of his work, he lays down the same rule in treating of agents, and cites as an example the case which is now before the court, namely, that of a servant paying money for his master. *Ibid.* 768.

These doctrines have been received and acted on to their fullest extent, in those states of the Union, where it is understood the science of jurisprudence has been cultivated with the most success; namely, in Massachusetts, Pennsylvania and New York. 11 Mass. Rep. 242; 2 Johns. Rep. 189; 5 *Ibid.* 256; 1 Dallas, 241; 3 Serg. & Rawle, 20.

Had this court been called to establish the rule instead of applying it, we should have hesitated much in adopting that which we have found in the books. The reasons of necessity and public convenience, which are stated as the ground for it, do not seem to us to have that weight, which others attach to them. For we cannot see what difficulty there would have been in all cases for the master or principal to have given a release, and thus have placed the witness without any interest in the cause. But we did not feel that, on that consideration alone, we would have been justified in setting aside a rule so long settled, and so generally adopted

We now proceed to notice that part of the work of Starkie on which the appellant relies. In the text, after stating the rule that agents are admissible on the score of necessity, he adds, "but although an agent who actually executed the business of his principal is, it seems, in all cases, competent to prove that he acted according to the directions of his principal, on the ground of necessity, and because the principal can never maintain an action against his agent, for acting according to his own directions whatever may be the result of the cause. Yet, if the case depends on the question, whether the agent has been guilty of some tortious act, or negligence, in the course of executing the orders of his principal, and in respect to which he would be liable even to the principal if he failed, the agent is not competent without a release." 3 Starkie, 1731.

If the grounds on which this author states the exception rests be correct, the rule itself is destroyed—they cannot stand together.

The rule is, that agents and servants, though interested, are admitted as witnesses *ex necessitate*, and from motives of public convenience.

The exception is, that they are not so when interested, in consequence of their being liable over to the party who calls them, in case he fails in the action.

If the reason given by the author for the rule, was correct, the distinction which he takes might be admitted.

That reason is stated to be, that where the agent or servant, acts according to the directions of his principal, the former can never be responsible to the latter in an action.

But this reason is most clearly not that on which the rule rests. In the case of an agent called on to prove that he acted according to the instructions he received, the argument assumes every thing that is disputed; the compliance with instructions being the very fact which the witness is called on to establish, and the non-establishing of which would most clearly render him liable over to those who employed him.

The cases most frequently given in support of the general rule, are, money intrusted to an agent or servant to be paid to another, or goods delivered to a carrier to be handed over to a third person. Now we cannot distinguish these cases on the score of liability of the witness, from that before the court. In them, the fact at issue being

the delivery of the goods or the money, it is clear, that if the agents or carriers failed to establish that the thing confided to them had been delivered, they would be responsible to the principal, and that in proving they did they destroyed the responsibility. So here the witness, in proving that the money was paid to the defendant, may throw the liability off himself. The cases cannot be distinguished, except that in the latter his interest is not so great, as will be hereafter shown.

If the witness, in the instance before us, had been sent by the bank with a sum of money to make a payment, and the fact of his having done so was afterwards contested, he would present the very case which is invariably given as an illustration of the rule, and he would be competent to prove that he had delivered it; and yet in that case, he would be as responsible to the bank in case he failed to show that he had discharged faithfully the trust committed to him, as he would in the action before us, if he failed to prove that he had committed an error, and paid through mistake, a part of the funds with which he was intrusted, to the defendant.

Nay, he would be more so; for, in proving that he committed an error, he would establish his liability to the bank, in case of the insolvency of the defendant.

The distinction, then, which this author makes on the ground of liability, is on principle, entirely without foundation—it is equally unsupported by authority. It has been expressly decided, that, where a carrier who was directed to deliver money to A, delivered it by mistake to B, in an action by the owner against B, the carrier is a competent witness without a release. 3 Campbell, 144; Buller's *N. P.* 289.

The authorities quoted in support of the doctrine which we have just examined, do not support the writer. They are all cases which arose on the negligence or tortious acts of servants, in driving carriages, and they turn on a principle already recognised by this court, that where the act of the servant has been out of the ordinary course of his employment or a mere breach of duty, he is not a competent witness without a release. Phillips on Evidence, 100; 4 Term. Rep. 590; 4 *N. S.* 340.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Livermore, for the plaintiff.

Carleton and *Lockett*, for the defendant.

Smith v. Harrathy. V, N. S. 319.

A new trial may be prayed for, after three days, if the judgment be not signed.
If a party *is bound to furnish an account*, his adversary may use that part of it which is against him, without being compelled to admit the items in it that are in his favor.

PARISH Court of New Orleans.

MATHEWS, J., delivered the opinion of the court.

In this suit the plaintiff claims from the defendant 381 dollars and 43 cents, on account of corn and oats, which he alleges was received by the latter from him as a part of a common stock of such articles, which was to have been furnished mutually by the parties to the present action; and to have been sold by the defendant for their joint benefit and interest. It is alleged in the petition, that he entirely failed to furnish any thing to the stock, which was to have been common; and the pleadings of the cause end in causing accounts to be submitted by both parties. On which, and the evidence in their support, the court below rendered judgment in favor of the plaintiff, for 51 dollars and 26 cents; from which the defendant appealed.

Previous to taking the appeal, an application was made by the applicant to the parish court for a new trial, which was refused on the ground of not having been made prior to the expiration of the time allowed by law.

The record shows that a new trial was not asked, until three days after judgment had been entered upon the minutes of the court; but it was moved for before the judgment was signed by the judge. According to the provisions of the Code of Practice, three judicial days appear to have been intended as the time allowed after final judgment rendered, to move for a new trial. See Art. 546 and 558.

If no application be made for a new trial within that period, and the judgment be signed in pursuance of the Art. 546, it could not afterwards be legally made. But the question which arises on the state of the present case, is whether this limitation of time be a bar to any motion made for a new trial when the judgment is not actually signed. A case occurred analogous, if not similar, to that now under consideration, soon after the organisation of this court, in which it became necessary to give an interpretation to the section of act of 1813, which related to the manner of making a statement of facts. The opinion therein expressed by the court, recognised the right to make such statement at any time before the actual signing of the judgment. See T. R. p. 201. A judgment, though entered on the

minutes of the court, cannot be considered as fully complete and efficacious until it receives the signature of the judge, because this is required by law; and until it be thus completed, we are unable to see any good reason why it should not be open to a revision. Certainly none better or stronger can be stated, than might fairly be urged against the statement of facts made after the time of rendering judgment, but before its signature.

This view of the cause shows evidently that we differ in opinion with the judge *a quo*, as to the reasoning which influenced him in rejecting the application of the defendant for a new trial. But as the record contains all the grounds on which such application seems to have been based, we must proceed to examine their soundness and sufficiency to support the pretensions of the applicant.

The principal, if not the only, objection made to the correctness of the judgment of the parish court, is the rejection of 250 dollars, claimed by the appellant, as having been by him brought into the partnership, and by which the common stock or capital was increased to that amount in addition to the 616 dollars furnished by the appellee. In support of this item of 250 dollars as charged in the account rendered by the defendant, no evidence was offered on the trial of the case in the court below. But it is now contended, that as the court made this account the basis of its judgment, it ought to have been admitted *in toto*. To this proposition on the part of the appellant, we cannot assent. It is certainly a sound general rule in relation to evidence, to be admitted on record in courts of justice, that a party to a suit cannot create testimony exclusively favorable to himself. It is difficult to imagine any circumstances in cases of open accounts, where one of the parties is legally bound to account to the other for the management and conduct of affairs in which the latter is solely interested, or in which both may be jointly, of sufficient force to form an exception to the general rule above stated. We are, however, decidedly of opinion that the present cause is not so circumstanced, as to tolerate the slightest deviation from the rule. The item of 250 dollars, standing wholly without support, either from evidence or judicial confession, was properly excluded from the account rendered by the defendant in giving judgment; and the court below decided correctly in basing its decision on the capital furnished by the plaintiff alone, and the trading operations which took place on it, being the only matters admitted by both parties to the suit. As the appellant was legally bound to prove the item of 250 dollars, claimed by him as a credit, on the trial of the cause in the parish court, a new trial ought not to be granted, unless upon the ground of a discovery of evidence subsequent to the trial, &c. That he had made such discovery, the record furnishes no evidence. From the principles assumed in this decision, it is readily perceived that the present case differs essentially from that of Wakeman, Ass. of Foot, *v.* Marquand & Paulding, recently adjudged. In that, the party who introduced the account, which the other wished to take advantage of to his pre-

judice, was not bound to render any account, and if admitted at all as evidence, was properly received in its totality.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Lockett, for the plaintiff.

Preston, for the defendant.

Poignand *v.* Livermore. V, N. S. 324.

Proof of the dissolution of a partnership need not be in writing.

An authority to a partner to settle the affairs of the partnership, does not authorise him to endorse notes belonging to it.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action against the owner of a steamboat, for money advanced to the clerk to pay the wages of the crew, and to purchase necessaries for her. The general issue was pleaded: the court below gave judgment for the plaintiff, and the defendant appealed.

The petition set out two demands; one of them has been abandoned: the other is evidenced by a note in the following words:—

Louisville, Aug. 25, 1821.

$300. Three days after date, I promise to pay to the order of Wm. F. Peterson & Co., three hundred dollars, for value received, on account of steamboat James Ross and owners.

(Signed) GEO. F. BARTLETT.

The note is endorsed, "Pay to D. R. Poignand, or order. Israel Munroe, agent and assignee of the late firm of Wm. F. Peterson & Co."

The first objection made to the plaintiff's right of recovery is, that there is not proof the note was endorsed to him by the payees.

One witness swears that by the public papers he has seen a dissolution of the firm of Wm. F. Peterson & Co. but does not recollect the date.

Another declares that the partnership was dissolved at Louisville, on the 2d October, 1823, and all the concerns of the firm were placed in the hands of Israel Munroe, to close the concerns of the firm.

A third states that the firm is dissolved, and that Munroe is the acting partner.

It is objected that the proof of the dissolution and agency should be made by written, not by parol evidence.

This argument assumes that all partnerships are entered into in consequence of agreements reduced to writing, which we believe is not the fact, nor is it necessary to their validity. If entered into verbally, they may be dissolved in the same manner. No evidence has been adduced that the contract of this partnership was reduced to writing, or that it was dissolved in that way. The parol evidence was therefore properly admitted.

The same observations apply to the authority of the agent not being proved in writing.

But whether the authority which, the evidence shows, was given to the acting partner, enabled him to endorse bills or notes belonging to the firm, is a question equally important in settling the legal rights of the parties. The pleadings and evidence show that the note was endorsed after the dissolution of the firm by the acting partner, who was authorised to close its concerns, and that this endorsement was made in the state of Kentucky. The testimony also shows, that the assignment was made to cover a claim against the firm.

Whether we take the system of law which prevails in the country where this contract was entered into, or follow on our own as a guide, no authority has been shown in the acting partner to endorse the note sued on; and consequently the plaintiff has not proved that the right of the payees is vested in him. By our law, a general power to settle the affairs of a partnership, would not authorise the partner to endorse notes which belonged to it. The mandate to endorse must, in the language of our Code, be express and special. It is equally clear that, at common law, an authority given to one partner to settle the affairs of a firm which is dissolved, does not empower him to endorse bills or promissory notes, even though, as in the present case, they existed prior to the dissolution, and were transferred for the purpose of liquidating the partnership debts. Civil Code, 29, 66; Watson on Part. 212; 1 Henry Black. 155; 3 Esp. 108; 4 Johnson, 224.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed. And that there be judgment for the defendant as in case of nonsuit, with costs in both courts.

Whittelsey, for the plaintiff.

Defendant in person.

The State *v.* The Bank of Louisiana. V, N. S. 327.

When the record enables the court to act on the merits, their attention may be drawn, without a formal assignment, to any error in the proceedings, after ten days have expired from the filing of the record.

A bank may be sued by one of the stockholders, for his dividend, before the charter has expired.

The authority of the attorney-general to prosecute or defend any suit in which the state is concerned, results from his office, and is expressly given by statute.

Although the charter constitutes the board of directors judges of what dividend they should order, yet, if in the exercise of that or any other power confided to them, they abuse it, courts of justice will control them.

The profits made by the Louisiana Bank, on the sale of the state bonds are to be divided like any other profits, made by it in ordinary transactions.

The object for establishing a bank with corporate powers, is not merely the division of profits among its members.

The directors of the Bank of Louisiana, in selling the bonds of the state, had a right to pledge the faith of the institution that the profits arising from the sale should not be divided until payment was made by the state of her bonds to that amount, and the contract is binding on the state.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The attorney-general alleged that the state, in pursuance of the charter of the bank, delivered it her bonds for 2,400,000 dollars, in payment of her subscription of 2,000,000 dollars to the stock; or, at the rate of 100 dollars in her bonds for 83 dollars 33⅓ cents of stock; and in compliance with a provision of the charter the bank sold, on their own account, these bonds for a profit of 321,822 dollars 33 cents, before they went into operation. The subscription of the state of 2,000,000 being, at that time paid in full, while the other stockholders, altogether, had paid but 138,840 dollars on theirs. So that the state was entitled to 300,731 dollars 66 cents, as her share of these profits.

That by the charter a sinking fund was constituted for the state, to be administered by her treasurer and the president and cashier of the bank, for the redemption of her bonds; and the said treasurer, president and cashier, were directed by a resolution of the legislature to demand that the portion of the state in the profits so made by the sale of her bonds, should be placed under their direction, to be by them applied to the purposes for which the sinking fund was established; and they were instructed on the refusal of the bank to inform

the attorney-general, whose duty it was made to take legal measures for enforcing the demand.

The petition concludes with an averment of the demand and refusal, and a prayer for judgment against the bank; and that the money be placed under the direction of the administrators of the sinking fund.

The answer admits the subscription of the state, and the delivery of the bonds, as alleged.

It avers the bonds were made payable to the President, Directors and Company of the bank, their successors or assigns; and the mode of assignment prescribed by the charter, was the endorsement of the president and cashier. The bank was authorised to contract for the semi-annual interest accruing on the bonds, at such place as the president and directors might deem expedient; but it was provided, that any charge or expense, consequent on the payment of such interest any where but at New Orleans, should be defrayed out of the funds of the bank.

It next avers, that the bank entered into a contract, in the city of New York, with Thomas Wilson & Co. of London, for the sale of the bonds, and accordingly assigned them; and by their endorsement the bank bound themselves for the discharge of the principal, and for the payment of the interest, at the exchange of four shillings and sixpence sterling, per dollar, at the counting house of the purchasers, in London, and at the risk and expense of the bank; paying to the said Thomas Wilson & Co. a commission of one half of one per cent. for receiving and paying such interest.

It is further alleged, that previous to this contract, at a board of directors of the bank, twelve of them being present, it was

"Resolved, as the opinion of the board, that no sum of money which may be obtained by the sale of the bonds of the state, belonging to this corporation above the price of 83⅓ per cent. and not exceeding one hundred, can justly be divided as profits, except in proportion as the dividends on the stock held by the state in the bank shall have left a surplus, after paying the semi-annual interests, to be applied to the payment of the bonds, and the amount of 400,000 dollars shall have been rendered.

"Resolved, That the president of the bank be authorised to communicate the foregoing resolution to such persons as may make proposals for the purchase of the bonds, and to pledge the faith of this corporation not to make any dividend contrary thereto."

The answer sets forth, that these resolutions were made known to the purchasers, at whose special request, they were inserted at length in the agreement for the sale of the bonds, and that, at the time of the passage of these resolutions, and that of the sale, the whole number of shares of the capital of the bank, subscribed by other stockholders than the state, was 6942, leaving to be subscribed 13,058 shares; and the adoption of these resolutions was indispensably necessary in order to insure the sale of the bonds of the state and the subscription of the remaining part of the stock, which was afterwards wholly taken

on the faith of these resolutions, and which, with that previously subscribed for, is bound for the discharge of the bonds of the state, and the payment of the interest, according to the contract.

The answer concludes with an averment, that although a profit may hereafter appear to have been made, yet it is impossible for the directors to say that any has, or if any, to what amount, inasmuch as this will depend on the rate of exchange in London, during a long series of years, and the profits made by the bank on its ordinary operations—that the board has ever made such semi-annual dividends of the profits of the bank, as to them appeared advisable.

The state had judgment, and the bank appealed.

The documents accompanying the record, are:

1. The sale of the bonds of the state by the bank, to Thomas Wilson & Co. It purports to have been made with reference to the resolutions of the board, stated in the answer.

2. A resolution of the legislature, by which the directors of the bank appointed by the state, are required to remonstrate against any further reservation being made of the surplus profits of the bank, greater than prudence may render necessary, and the necessities of the state; and the president and cashier of the bank, appointed by the charter administrators of the sinking fund, are directed to demand from the board that the share of the profits made by the sale of the bonds, to which the state would have been entitled if such profits had been divided among the stockholders, at the time the bank commenced its regular operations, in proportion to their respective amount of stock paid for, be placed under their administration to be applied to the purposes for which the sinking fund was established; and if the demand be not complied with, within thirty days, they are directed to make a report to the attorney general, who is required to take such legal measures to enforce the demand, as he may deem proper.

3. A resolution of the board, setting forth (on the demand) that the surplus funds of the bank are no greater than is necessary for the protection and safety of the bank; nor (after deducting the amount reserved, at the last semi-annual dividend, to cover the loss that may probably accrue to the bank from the late failures) than ought to be retained by a provident administration, acting in accordance with strict banking principles, and concluding with the expression of the unanimous opinion of the board; that the directors having already divided such a portion of the profits of the bank as to them seemed advisable, it was considered inexpedient to comply with the demand.

4. A letter from the cashier to the attorney general, in answer to one of the latter, informing him that when the bank went into operation, the amount of cash received was 35,640 dollars, and of notes endorsed, 103,200 dollars. The capital paid before the first dividend was 2,000,000 dollars, by the state, and 395,660 dollars, by other stockholders, before the bank went into operation; and between that

period and the dividend 132,900 dollars, were paid by individual stockholders.

5. The report of the commissioners of the sinking fund, to the attorney general.

6. A general statement of the affairs of the bank, on the 23d of January, 1826.

7. A statement of the moneys remitted to Thomas Wilson & Co. for the interest due on the bonds, from November 1, 1824, to July 1, 1825, amounting to 80,000 dollars; from the last date to January 1, 1826, 60,000 dollars, and like sums to July 1, and to January 1, 1827; in all, 260,000 dollars, premium 19,047 dollars, 66 cents, the commission on four instalments, 1,00 dollars; postage 677 dollars. These charges amounting to 20,404 dollars, 53 cents, and the whole to 286,404 dollars, 53 cents.

8. A statement of the dividends declared; showing that in July, 1825, a dividend of 2½ per cent. was declared, amounting to 62,185 dollars, 09 cents; of which the state received 50,000 dollars, and other stockholders, 12,185 dollars, and that in January, 1826, a dividend of 3 per cent. was declared, amounting to 78,529 dollars, 63 cents, of which 60,000 dollars, were received by the state, and 18,529 dollars, 53 cents, by other stockholders.

No testimony was introduced on the part of the state; that introduced by the bank, shows:

Lamfear deposed, that the articles of agreement for the sale of the bonds were discussed and closed in his presence, and payment was made according to them. The endorsement of the bonds was in the following form, viz.—"The President, Directors and Company of the Bank of Louisiana, for value received, do hereby assign the within bond to ————, and bind the capital stock of the said bank, for the payment of the principal sum of said bond, according to the tenor thereof; and do engage to pay the half yearly interest thereon, at London, at the rate of four shillings and sixpence sterling per dollar, upon the presentation and delivery of the dividend warrant, in the margin thereof; the interest to commence from this day. Witness, the signature of the president and cashier, and the seal of the bank, this first day of November, in the year of our Lord, one thousand eight hundred and twenty-four. Benjamin Story, President; Joseph Saul, Cashier."

The two resolutions of the bank inserted in the answer, were recited in the contract; and were essential, and indeed, indispensable to the sale of the bonds at the price given for them, (98½ per cent.) and the deponent considered they could not have been sold, except at a much lower rate, if these resolutions had not been passed. He founds his opinion, in this regard, on the circumstance or belief, that the real and essential security of the purchasers of the bonds, is the bank; and to render that security good, it was necessary that the whole price paid for the bonds should remain in bank; there being at the time of the sale but a small part of the stock subscribed for; and it

being understood, the state had but little disposable property, besides the power of taxation. He does not believe the balance of the stock would have been subscribed, had it been understood that the surplus of the proceeds of the bonds, beyond the sum for which the bank received them, was to be divided among the first stockholders.

Parker deposed: he is a merchant, and has resided for several years in New Orleans. On an average for a number of years past, the exchange on London, on bills drawn in New Orleans, has been at a premium. In his opinion, the retention of the profits on the sale of the bonds of the state, enhanced the stock of the bank; but he cannot say to what degree.

Zacharie deposed that, on the opening of the books, he subscribed for a great number of shares on account of several individuals, who had given him orders for 500 shares. He took twenty shares for each of his employers; but this number was reduced to nineteen. He considered the original subscribers as exclusively entitled to the profits on the bonds of the state.

Saul deposed: he is cashier to the bank. The surplus retained on the first dividend in July, 1825, was 131,364 dollars and 85 cents, including discounts on bonds discounted, at twelve months; consequently only one-half of the amount could be divided, as the dividends are semi-annual. He thinks that, in a bank with a capital like that of the Bank of Louisiana, it is proper to retain a surplus of from 250 to 300,000 dollars, besides discounts on twelve months' bonds. On the dividend in July, 1825, he thought that 2 per cent. only should have been, instead of 2½ per cent. that were, declared. He has resided a number of years in New Orleans, and has scarcely ever known the exchange on London, at par. Generally the premium varies from 5 to 10 per cent.

On his cross-examination, this witness said the surplus retained in January, 1826, was 512,000 dollars, including 320,000 dollars, made on the bonds of the state. 300,000 dollars were retained for a permanent surplus fund; 80,000 dollars from discount of bonds for making up the dividend in July; and 130,000 dollars, in consequence of protested bills and offset.

The points made by the counsel of the bank are, that—

1. This suit was instituted without authority, inasmuch as the resolution of the legislature, relied on by the attorney general, is void; being contrary to the 10th section of the first article of the constitution of the United States.

2. The charter of the bank constitutes the board of directors, the sole judge of the amount of profits to be divided: and this is a part of the contract between the state and the other stockholders, and ought not to be violated.

3. The district judge fell into a great error, in assuming that 321,822 dollars, were made by the bank on the sale of the bonds of the state; whereas, in truth, it cannot be ascertained whether there will be a profit or a loss, until their final payment; and inasmuch as

this will depend on the rate of exchange during a period of upwards of twenty-five years.

4. The resolutions of the board, incorporated into the agreement with the purchasers, were essential to the sale of the bonds, and the bank going into operation; and if any profit result from the sale, it is in consequence of these resolutions. The bank had power to make such a contract with the purchasers, and it cannot be violated.

5. This prosecution, on the part of the state, is highly impolitic.

Before trial, but before the expiration of the ten days allowed for the assignment of errors apparent on the face of the record, (Code of Practice, 897,) the counsel for the bank added a new point.

6. The bank is not suable by the state as a stockholder, except for a settlement of accounts, and the balance appearing due thereon.

The following points were filed by the attorney general.

7. The object of every subscriber to the capital of a bank, is the instant division of the profits as they are made.

8. The profits made on the sale of the bonds, belong exclusively to the stockholders at the time of the sale, and those who subscribed afterwards can not legally participate in them.

9. They are not to be divided according to the clause of the charter, directing semi-annual dividends; this clause relating only to the ordinary profits of the bank, viz:—those made by loans or discounts, and the purchase and sale of bills of exchange. The profits in controversy, presenting a *casus omissus* in the charter.

10. The board acted improperly and illegally, in retaining a part of the profits.

VI. As the last point made by the counsel of the bank impugns the right of the state to maintain the present suit, it is first to be disposed of.

The attorney-general moved to have it stricken out, because it was filed too late.

On this part of the case, our opinion is with the counsel of the bank. He has not resorted to this assignment of errors to sustain his appeal: he had a statement of facts to rely on in the documents and testimony that came up with the record. He is, therefore, at liberty at any time, even without a formal assignment, to draw our attention to any apparent error. It is only when "the appellant does not rely wholly or in part, on a statement of facts, an exception to the judge's opinion, or a special verdict to sustain his appeal: but on an error of law, appearing on the face of the record;" that he is "allowed to allege such error, if within ten days after the record is brought up, he files, &c." But when the record enables us to act on the merits of the case, our attention may be drawn at any time by either of the parties, to any error of the inferior judge, without having been formally assigned. Indeed, the court would of itself, in many cases, notice the error, even if it escaped the attention of the counsel. Suppose the suit be for the recovery of the wages of iniquity, or to enforce the performance of an illegal or immoral contract, could we affirm a

judgment in favor of the plaintiff, because the defendant's counsel mistook, or disregarded his duty?

The attorney-general cannot complain that the assignment of error was filed too late; because his adversary was under no obligation of filing it at all, and may have the benefit of it without any, but an oral assignment at the hearing.

The bank relies for support in this part of the case, on the principle laid down by this court, in Faurie *et al. v.* Millaudon *et al.*, 3. *N. S.* 476.

The plaintiffs there, being some of the stockholders of the Planters' Bank, called on the defendants, other stockholders who had, or had had, the management of its concerns, for an account of certain transactions, and for damages alleged to have resulted to the plaintiffs, jointly with the other stockholders through the misconduct and fraud of the defendants. We held the action did not lie, because no partner is suable by a copartner, on a particular transaction of the partnership; but only for a general account, and the balance appearing due thereon.

On this point, however the opinion of the court is with the attorney-general; because the charter has provided that the stockholders shall receive semi-annual dividends of the profits of the bank. The right being semi-annual, the remedy may be resorted to semi-annually—and with regard to any part of the right that is violated: otherwise it would not be commensurate with the injury. This case differs materially from that invoked by the bank, which was a suit brought by a number of stockholders against the bank. C. P. 829, 830, and 835; 7 T. R. 543; 2 Maule & Selwyn, 53; 2 Kid on Corp. 109, 113, 122, 270, 302, 206, *et passim.* This opinion is also in conformity with the opinion of this tribunal, in the case of Brand *v.* The Louisiana State Bank, 8 *Martin*, 310; and that of the Supreme Court of the state of Massachusetts.

I. The want of authority in the attorney-general, to institute this suit, was not pleaded before the first judge. It is an allegation which should be made *in limine litis.*

In the case of Hayes *v.* Curry, in which the authority of the attorney, who instituted the suit, was questioned, we held that an attorney duly licensed, is a sworn officer; bound by his oath, as well as by the principles of honor and integrity, which ought to characterise the profession of which he is a member, to demean himself correctly in his practice. It is not to be presumed that he acts without proper authority: on the contrary, every presumption is in favor of his having pursued a proper line of conduct. 9 *Martin*, 88.

The authority of the attorney-general to prosecute or defend any suit, in which the state is concerned, does not, however, result from mere presumption. It is necessarily implied from the nature of his office, and is expressly given by the act of assembly, defining his duties. 1 *Martin's Digest*, 535.

II. It is true, as contended by the counsel of the bank, that the

charter constitutes the board of directors as the sole judge of the amount of profits, which it is, from time to time advisable to divide; and, that this is a part of the contract between the state and the stockholders, which ought not to be violated. But it is equally so as urged by the attorney-general, that in this respect they ought to act discreetly; and that if in the exercise of the power given them by this part of the charter, or any other, they act capriciously or illegally, the party injured may seek redress in the courts of justice.

Corporations may enact by-laws for the regulation of the means by which the object of their institution may be obtained. But these by-laws must be reasonable and consistent with the general principles of the law of the land; and this reasonableness and consistency is to be tested in a court of justice, when properly brought before it. 2 Kid on Corp. 107, 109, 113, and 122; 2 Maule & Selwyn, 153; 7 T. R. 553. The student may further attend to what was said by this tribunal, with regard to the right of the party to whom a new trial is refused, to question, on an appeal, the propriety of the exercise of the discretion vested by law in the first judge, in the case of Sorel *v.* St. Julien, 4 *Martin*, 168; and with regard to a continuance in that of Broussart *v.* Mahar's Heirs, *Ibid.* 489.

III. IV. The error, which it is complained the first judge fell into, in examining the quantum of the profits made by the sale of the bonds of the state; and the power of the board in passing two resolutions, inserted in the answer, and in pledging the faith of the corporation for the payment of the principal of these bonds, will be examined, with the merits of the case in the tenth point.

V. Whether it be impolitic to bring the present suit, is a question which we trust was duly weighed by the law officer of the state, before he instituted it. We are to determine whether the right exists, and have nothing to do with the policy or impolicy of exercising it.

VI. VII. The sixth point has already been disposed of; and the seventh presents nothing but an abstract of the profits, which will be examined with the merits of the case in the tenth.

VIII. It will be time, and the province of those who are to make the division, to inquire whether the profits made by the sale of the bonds of the state, belong exclusively to the stockholders at the time of that sale, when the proper authority in the first or last resort shall have determined that they are divisible.

IX. We cannot assent to the proposition contended for by the attorney-general, that such profits are to be divided at any other time, or in any other manner, than profits made by the bank in its ordinary transactions, on loans, discounts, and the purchase or sale of bills of exchange, or in any other way whatsoever.

The words of the charter are sufficiently ample to cover the profits in controversy. All the profits are spoken of without any exception, and *ubi lex non distinguit, nec nos distinguere debemus.* Why should we make a gratuitous exception, to place at our disposal that

of which the legislature has pointed out the application? There is no ambiguity in the words used, the profits of the bank; they must necessarily apply to *all* profits of the bank. When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of following its spirit. Civil Code, 4, art. 13; Knight *v.* Smith, 3 *Martin*, 165.

Indeed, were we of opinion, that these profits really arose from a *casus omissus*, in the charter, what other disposition could we decree of them, than that pointed out by the legislature in similar or even analogous cases? *Ubi eadem est ratio, eadem est lex.* Would we not say these profits ought to be divided by the same persons, at the same time, in the same proportion, and among the same individuals as other profits? Should the board find it convenient to sell any property of the bank, and do so with a profit, can there be any reason for a distinct partition of what is thus gained?

X. The last point brings us to the merits of the case.

The attorney-general says that the object of the contract of partnership is the division of the profits. *Contractus societatis est quo duo, pluresve, inter se pecuniam, res aut opera conferrunt eo fine, ut quod inde reddit lucri, inter singulos, pro rata dividatur.* Watson's Partnership, 1 and 2.

This doctrine is perfectly correct with regard to private partnerships. But corporations are constituted for public purposes. They do not answer the object of their institution, when those to whom the administration of their affairs is confided, losing entirely sight of that object, confine their views to making and dividing profits among the corporators.

The legislature contemplated, in the incorporation of the Bank of Louisiana, the creation of a capital of four millions of dollars, which, by enabling the institution to emit and keep afloat notes to a corresponding amount, should afford it the means of relieving the agricultural and mercantile interest of the state from the pressure of almost universal distress.

This relief was the chief and main object for which the corporation was erected. The profits, the corporation were to divide from the investment of their funds, were the inducements held out; and their efforts to obtain these profits, consequently insure the relief, were the means by which the object was to be obtained.

The first board of directors, in assuming the trust confided to them, found it imposed a threefold duty:—Towards the state, and their fellow citizens at large, they were bound to exert their utmost faculties in promoting the object intended for their relief, by securing the early and full subscription of the capital of the bank. Towards the corporation, they were bound to protect this capital, by maintaining it in its integrity, and rendering it profitable. Towards the corporation, they were bound to make such semi-annual divisions of the profits, as to them, in the language of the charter, appeared advisable.

At a time, when the people labored under the burden of heavy

debts, contracted during a period of apparent, but delusive prosperity, a capital of two millions of dollars was to be subscribed for, and bonds of the state to the same amount, were to be brought into market for sale. Subscribers were deterred by the obligation imposed on the bank to keep branches in the country, the experience of the State Bank showing them how burdensome these establishments are—to loan a considerable part of its capital at these branches, on landed security, and to be repaid at deferred annual instalments, and chiefly by the difficulty that it was thought would attend the sale of the bonds of the state, which the charter forbade to be disposed of, at the rate below which the bank had received them.

Louisiana is comparatively as wealthy as any state in the Union. But whatever may be the wealth of a state, or potentate, capitalists generally prefer a solvent individual or corporation, to a crowned debtor or independent state; because the latter are incoercible and rarely feel a keen interest in creating or maintaining a reputation for probity and punctuality—the basis of all credit.

Great Britian and France are, perhaps, the wealthiest states in Europe; yet a number of our fellow citizens have been taught by sad experience, that but little dependence may be placed in the punctuality with which the faith of Great Britian may be expected to be redeemed. It stands pledged since 1815, for the value of their slaves carried away in her fleets; yet their payment seems more distant after the lapse of twelve years, than it was supposed to be at the ratification of the treaty of Ghent. They find that the faith of the Bank of England and many a private banker in London, on the score of punctuality, would have been a surer pledge than that of the nation. When the allied sovereigns had succeeded in replacing the Bourbons on the throne of France, they declined to take the monarch, with all the resources of his kingdom, as their debtor, for the expenses they had incurred, unless the faith of a private banking house in London was superadded to the royal engagement.

Had the bonds been sent into market, without the pledge of the faith of the bank, purchasers would have reflected that the certainty of the bonds being paid, at their maturity, might be doubted; and that if they were not paid then, the obtaining payment of them would be an object, attended certainly with trouble and delay, probably with expense, and possibly pursued without success. The taxes intended to raise the funds might remain uncollected and perhaps unlaid.

Many individuals have noticed from the form of these bonds, inserted in the charter, that it was not expected by the state, that the bank should pledge itself for the payment of the principal.

These bonds are payable to the President, Directors and Company of the Bank of Louisiana, their successors or assigns, not to their order; and the bank are authorised to sell them for their amount, that is, to transfer for a valuable consideration their right to the state.

He, who sells a debt, warrants its existence at the time of the sale, but not the solvency of the debtor. Civil Code, 368, art. 125 and 126. The obligation to guarantee the payment of the principal of these bonds was neither of the essence nor of the nature of the contract by which they were sold, though it might be and was the result of an adventitious clause inserted in the contract.

The dubious success of the institution appearing to depend on the sale, to enforce and effect it, if possible, with a profit, was the object of the constant attention of the board. No better means presented themselves to them, to compass this desideratum than to superadd the pledge of the faith of the bank, to that of the state, and with a view of increasing the security of the purchasers by adding to that of their incidental debtors, they promised to retain out of the profits made by the state, a sum not exceeding 400,000 dollars, until the payment of the bonds of the state to that amount. So that while the corporation underwent a responsibility for 2,100,000 dollars, it might be able to present to its new creditors a corresponding pledge in its hands, viz.—2,000,000 dollars, in the bank stock of the state, and as much of the profits of the sale, as would amount to 400,000 dollars.

The directors of the bank being charged with the administration of its affairs, may certainly pledge its faith in the execution of their trust. Indeed, in most cases, it is impliedly so, as it was in the present for the existence of the debt sold. If, in order to effect the sale and to enforce a profit, it became advantageous to the bank that its faith should be pledged expressly for the payment of the bonds of the state, it is not easy for us to see on what ground it may be contended that while the directors sold a debt due to the bank, and received its value, they should not accede to the stipulations of the vendee; that the price paid should be restored to him, if he could not obtain payment from the debtor of the bank.

The charter gives the power, and interest makes it the duty of the board, to retain such parts of the profits of the bank as they think advisable. If, therefore, the board thought it advisable, in order to effect a sale and an advantageous one, that the profits made thereon, or a part of them, should not be divided till a certain contingency happened, they acted legally and discreetly in making the promise: unless it be contended that a board of directors cannot derogate from the powers of a subsequent one, and that every board has semi-annually the power of determining what part of the profits of the bank it is advisable to demand; unfettered, nay, unembarrassed by the opinion of any preceding board. This question may be discussed and determined by any future board declaring a dividend. Admitting that it may properly be determined in the affirmative, nothing can prevent a subsequent board from considering the resolution of the first, as discreet and advantageous to the bank, and as such to be carried into effect, notwithstanding their want of obligation. We are to conclude, as the directors who made the first and second divi-

dend did not divide the profits in controversy, they did not deem it advisable to do so.

Another consideration appears to have justified the conduct of the board in a considerable degree. The place of payment of the interest arising on the bonds, was to be fixed by the bank. Payment in London (the market in which the bonds were expected finally to find the readiest sale,) was offered, a circumstance, which, while it presented a great inducement to purchasers, and insured a high price, was attended with a corresponding burden on the bank, and detracted from its profits.

It is in evidence, the bank became bound to pay a commission of one half of one per cent. for receiving and paying the semi-annual interest in London; and that funds are not conveyed thither from New Orleans, without a loss; that bills of exchange, which offer the cheapest mode of remittance, are generally bought at a premium of from five to ten per cent. Taking 7½ per cent. the medium, for the average price, and adding the commission paid in London, we have 8 per cent. Two per cent. will be absorbed, by a commission on brokerage here on the purchase of the bills, and a proper allowance for the risk incurred by endorsement. This makes the loss 10 per cent.

The interest on 2,400,000 dollars, at 5 per cent. is 120,000 dollars, and the loss on this at 10 per cent. is 12,000 dollars, which, repeated yearly, during ten years, to the maturity of the first bonds, is 120,000 dollars.

On the bonds payable in fifteen years, the annual loss is reduced by one fourth, by the payment of the first bonds: 9000 dollars a year for five years, 45,000 dollars.

On the bonds at twenty years, the yearly loss is 6000 dollars, and for five years, 30,000 dollars.

On the last bonds, payable in twenty-five years, the annual loss is 3000 dollars; for five years, 15,000 dollars.

The aggregate loss is 210,000 dollars. It diminishes the profits of the sale; not, indeed, by that nominal sum, which is to be paid by several and defined instalments, whilst the profits are received at once.

The attorney-general urges that, by the clause in the charter, authorising the bank to fix the place of payment of the interest accruing on the bonds, it was provided, that the charges and risks attending such payments, elsewhere than in New Orleans, should be borne by the bank. Hence, he concludes that the bank has no right to withhold from the state, any part of its share in the profits made by the sale, to meet the remote chances of loss on exchange, commission in London, or failures. He views the exemption of the state from any defalcation on this account, as a *bonus* stipulated for in the charter.

Had an actual *bonus* been stipulated for the money, the payment

of it must have reduced *pro tanto*, the profits of the bank; and, consequently, the share of the state in the profits.

In declaring a dividend, the preservation of the capital of the bank in its integrity is never to be lost sight of, and the profits left after the payment of the *bonus*, if any be stipulated for, are alone divisible. In other words, when the state is a stockholder, it must as such, bear a part of the *bonus*, payable in money, or resulting from an exemption of charges.

After a close examination of the evidence, and much attention to the arguments of counsel, the impression left on our minds is that the bonds of the state were estimated at a fair value in the charter; and that if they have been sold above this value, it is owing to the pledge of the faith of the bank, and the assurance given that the profits made on the sale to the amount of 400,000 dollars, should not be divided until one-sixth part of the bonds should be discharged, and leave the 2,000,000 dollars, the stock of the state in the bank, equal to the amount of the bonds remaining unpaid.

We conclude, that the passing of the resolutions of the board, recited in the agreement for the sale of the bonds, was the discreet exercise of legitimate authority, and that the engagement taken in pursuance of these resolutions, by the agent of the bank in the sale of bonds, ought not to be violated.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and proceeding to render such a judgment as, in our opinion, ought to have been given in the district court; it is ordered that the defendants be dismissed.

The Attorney-General, (*Preston*,) for the state.

Livermore, for the Bank.

Laporte *v.* Landry. V, N. S. 359.

The post-office is not a place of deposit for notices of protest, but the mail may be used as a means of their conveyance.

The offer of an endorser to endorse a note for the same sum, is not a waiver of notice.

SECOND District.

MARTIN, J., delivered the opinion of the court.

The defendant, sued as endorser of a promissory note, pleaded the general issue; there was judgment against him, and he appealed.

The note, endorsement and protest were proved.

The parish judge, acting as notary public, gave notice of the protest to the defendant by a letter directed to him, and put into the post-office at Donaldsonville, parish of Ascension, on the day of the protest. He demanded payment from him, offering to accept his own note; this the defendant declined, but offered to endorse a note of the maker for the same amount.

The defendant resides four miles from Donaldsonville, and in the same parish; there is no mail or post-office between Donaldsonville and the defendant's residence. He sends to the post-office at Donaldsonville for his letters and papers, ordinarily; at times, his friends take them out for him.

We are of opinion that the plaintiff has failed to show a legal notice. Where notice may be conveyed by mail, it suffices to put it in time, properly directed, in the post-office. But where the notice can not be conveyed by mail, it is idle to put it into the office; for the post-office affords a safe means of conveyance, but not a legal place of deposit for notices. This case is not to be distinguished from that of Clay *v.* Oakley, determined last fall at Alexandria.

The offer of the defendant to endorse a note of the maker for the same sum, is no evidence of a waiver of notice. This was pressed on us in this very case last winter; 4 *N. S.* 125; and we said the waiver could not be inferred from this circumstance.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment of nonsuit, with costs in both courts.

Morphy, for the plaintiff.

Conrad, for the defendant.

Barbarin v. Saucier. V, N. S. 361.

A conveyance alleged to be fraudulent, cannot be tried by seizing the property as belonging to the vendor and setting up the fraud as a defence.
An action must be brought to annul the conveyance.

FIRST District.

PORTER, J., delivered the opinion of the court.

The plaintiff states that the defendant who is sheriff of the parish of Plaquemine, has seized a slave belonging to him, to satisfy an execution issued against another person.

The defendant answers that the slave is really the property of the defendant in execution; and that the plaintiff in this suit has by a collusive and simulated sale, endeavored to defraud the plaintiff in execution.

The case was submitted to a jury, who found for the defendant, and the court below rendered judgment in conformity therewith; from which the plaintiff appealed.

We are of opinion that the question of fraud, could not be tried between these parties in the shape in which it was presented in the court below. Admitting the sheriff had power to contest it, which we doubt, but on which we express no opinion, the sale whether fraudulent or not, vested the legal title to the slave in the plaintiff and until set aside by the action which the law gives to creditors for that purpose, the sheriff had no right to seize it as the property of the vendor. The case cannot, in any respect, be distinguished from those of St. Avid *et al. v.* Weimprender's Syndics, 9 *Martin*, 648; and Haw *v.* Herriman, 1 *N. S.* 535.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiff do recover possession of the slave sued for, with costs in

* But see Weeks *v.* Flower *et al.*, 9 *Lou. Rep.* where the court say, in reference to the present case: "We are still satisfied that the principle is a correct one; but it will be found, that in all the cases which have turned upon that principle, the purchaser was in possession. If effect were given to a conveyance alleged to be collusive and simulated, and not accompanied by possession, it would be a clear violation of that provision of the Code, which declares: that the sale of immovables or slaves, made under private signature, shall have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered in the office of the notary, and the actua delivery of the things took place!"

both courts: reserving, however, to the plaintiff in execution, the right of establishing the fraud in an action to set aside the sale.

Smith, for the plaintiff.

Hennen, for the defendant.

Sterling *v.* Johnson and Wife. V, N. S. 362.

When by a decree of a court, a party is directed to file a release by public act, previous to taking out execution, it is not a compliance with the decree, to file one *sous seing privé*.

The acknowledgment of the husband before a notary, of an act under private signature by his wife does not make it a public act.

When a note is payable to the wife, the husband cannot transfer her right, nor bring nor defend a suit respecting it without her.

THIRD District.

PORTER, J., delivered the opinion of the court.

This case was commenced by an application for an injunction and the principal question presented for our decision grows out of a decree formerly rendered by the court in an action, wherein the defendants in this suit recovered judgment against the plaintiff.

That action was commenced on an obligation, made jointly to the defendants; that is, to the husband and wife. Different debts had been assigned by the plaintiff as a collateral security for the payment; and this court, after giving judgment for the amount due, directed "that the plaintiff do, previous to taking out execution, execute by public act, and file with the clerk of the district court in which the cause was tried, a transfer and assignment of the bonds of M'Gehee and Blackbourne, and M'Gehee and Nelson, or for all the remaining parts or portions of said bonds which may be due, after deducting the sums received by the plaintiffs, and credited to the defendants." 3 *N. S.* 489.

Previous to issuing the execution the plaintiffs filed in the office of the clerk of the district court, two instruments of writing, which, in obedience to the decree of this court, did renounce their right to the obligations therein mentioned; but that of the wife was an act *sous seing privé*, and that of the husband was as follows: "Be it remembered, that on this fifth day of May, in the year of our Lord 1825,

personally appeared, R. Post Johnson, for himself and Martha J. Johnson, his wife, of the city of New Orleans; who acknowledged the foregoing instrument of assignment, and transfer, to be their act and deed; and be it also remembered, that the said R. Post Johnson did, for himself and wife, relinquish, transfer, assign and deliver unto John Sterling, surviving partner of A. & J. Sterling, all the moneys that may be due on the bonds" &c., &c.

The cause was submitted to a jury in the court of the first instance, who found a verdict for the defendants, upon which verdict the court gave judgment dissolving the injunction. The plaintiff appealed.

The first point which it appears to us the case presents, is, whether the act of the wife under private signature, was a compliance with the decree of the court, that the assignment should be by public act.

We are of opinion that it was not. It does not conform with the letter of the decree; nor does it comply with the spirit and intention of it. The object of the court in directing the assignment to be by public act, was to insure the defendant against the trouble and difficulty of proving the instrument if it should be thereafter questioned. Were we even to admit that an act under private signature, was a compliance in substance, with the order of the court, the record offers no proof that the act of transfer was really executed by the wife.

The next is, whether the acknowledgment of the husband on the part of the wife, is binding on her, so as to make the *sous seing privé* a public act; and if it be not, whether the assignment made by him in the same instrument, in the name of his wife, supplies the defect.

The original suit was brought on a note, payable to both husband and wife; and the action was commenced in the names of both. In the absence of any evidence to the contrary, we are bound to consider that the part of the note which belonged to the wife had not entered into the community. As her property, therefore, he could neither alienate it, nor bring, nor defend a suit respecting it, without her. There has been an exception to this general rule, lately introduced into our Code, in relation to the partition of an estate belonging to the wife which consists in movables; provided the same has been brought in by her as dowry. But the jurists who drew up the amendments state in their report to the legislature, that it was not intended to confer this authority in case the estate was paraphernal. Admitting that we could, by parity of reasoning, extend the principle so as to sanction acts of the husband, other than partition, in relation to the property of his wife, the record furnishes no evidence which brings the defendants within the exception.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the defendants be enjoined from taking out execution on the judgment rendered in this court in the case of Johnson and Wife *v.* Sterling, until they comply with the condition therein expressed—and that they pay costs in both courts.

Woodroof, for the plaintiff.

Hennen, for the defendants.

EASTERN DISTRICT, FEBRUARY TERM, 1827.

Bigelow *et al. v.* Pigneguy. V, N. S. 367.

FIRST District.

This was a case of facts. When the proof leaves the merits doubtful, this court always leaves the verdict undisturbed.

Mellon *v.* Bucks *et al.* V, N. S. 371.

Abandonment transfers the property to the insurers without any acceptance on their part.

And after abandonment the insured cannot maintain an action against the owners and master of the vessel for not having delivered the property.

Nor can he maintain it on the ground that he is a *negotiorum gestor* of the insurers, when one of the objects of the suit is to take funds out of their hands which they have a right to hold in consequence of the abandonment.

FIRST District.

[Mellon v. Bucks *et al.*]

MATHEWS, J., delivered the opinion of the court.

This suit was commenced by attachment against two of the defendants as owners, and the other as master of a schooner called the Samuel Smith.

The plaintiff claims the value of certain goods, alleged by him to have been shipped on board the vessel aforesaid, at the port of New Orleans, to be carried to Port-au-Prince, which the master failed and neglected to do, whereby he and the owners became liable to pay the amount claimed, &c. The right or credit attached, as appears by the answers of the garnishees, is a debt which may be due from the Louisiana State Insurance Company to the defendants, on two policies of insurance, obtained for their benefit on the vessel and freight, &c. Judgment of nonsuit was pronounced in the court below, from which the plaintiff appealed.

The evidence of the case seems to establish the following facts:—That the plaintiff shipped his property on board the schooner above mentioned, owned by two of the defendants, and commanded by the third, to be carried from New Orleans to Port-au-Prince; that he caused to be effected insurance on the goods or property thus shipped, in the office of the Louisiana State Insurance Company; that in the same office the defendants obtained two policies of insurance—one on the vessel, and the other on the freight; that the schooner sailed from the port of New Orleans, on the intended voyage to Port-au-Prince, but was compelled by stress of weather to put into the port of Savannah, where she was condemned as unseaworthy; and her cargo sold in consequence of the master being unable to procure for it an immediate conveyance to the port of destination, and its being composed of articles in their nature liable to deteriorate, &c. It is farther shown that prior to the commencement of the present action, the plaintiff abandoned the property now in dispute to the insurers, and claimed remuneration or indemnity on his policy as for a total loss, and that he is now pursuing said claim in a court of competent jurisdiction. The insurers do not appear to have formally accepted the abandonment, or to have exercised any acts of ownership on the property abandoned.

This statement of the cause, presents two questions for solution:—First. Is the insured, after abandonment not accepted, and without any expression of will to relinquish his claim under it against the insurers, still to be considered owner of the property abandoned, so far as legally to entitle him to maintain the present suit?—Secondly. If he can not maintain it as owner, may he do so as agent for the insurance company, which is contended for by his counsel?

If the abandonment was made under circumstances which legally authorised such a step on the part of the insured, the insurers being bound to indemnify him as for a total loss, must be considered as having become owners of the property which was abandoned *ipso facto*, without any formal acceptance, but merely as a consequence necessarily following from the nature of the contract of insurance. On receiving information of the accident which affected the vessel and

her cargo, the plaintiff was bound to consider and determine whether, according to occurrences, he would abandon to the insurers, and pursue them as for a total loss; or retain his right to the property insured, and prosecute for a partial damage or injury. He has chosen the former mode of pursuit, and by so doing has divested himself of all title to the property claimed in the present suit, and transferred it to the insurance company, at least so far as his will was concerned in the transaction. This change of property and ownership it is perceived, is based on the presumption of the abandonment having been legally made, and this presumption may stand so far as it affects the interest of the insured until the contrary be proved; nor has he any right to complain of it, because it arises directly out of his own conduct. If he has really discovered since the abandonment, that his claim under it for a total loss can not legally be sustained, he might, perhaps, have relinquished it before acceptance, and adopted the present mode of pursuit; but so far from that, it is in evidence that he is still pursuing the insurers to obtain full indemnity in consequence of his abandonment. We, therefore, conclude that as owner he can not maintain the present action. See 6 Cranch, 268; 1 Caines, 292; Phil. Ins. 458.

In relation to the second question proposed, it must be admitted as a general principle, that in cases of abandonment, the original owners of property abandoned and their agents become the *negotiorum gestores* of the underwriters, for all beneficial purposes relative to the interest of the latter.

But in order to give validity to acts of such *quasi* agents, it is necessary that their conduct should be such as tends directly to benefit those whose affairs have thus, *ex necessitate*, fallen under their care and management. The very authority itself to act, and all rights and claims of a *negotiorum gestor*, arising out of his acts, are founded on advantage and benefit conferred on the persons, for whom he has assumed agency; or when it has been unavoidably thrown on him. Now to show that the plaintiff cannot bring himself under the influence and protection of the rules which are applicable to agents who act without previous and direct authority from persons whose business they undertake to conduct, we need only state the avowed object and intention of the present suit, in relation to the insurance company, whose officers have been summoned as garnishees. The plaintiff wishes to take from them funds which they hold in their hands, or money which they may be liable to pay to the defendants, who, under the abandonment made, are responsible to them for the property or its proceeds by him insured and abandoned; and this is demanded, as agent, *ex necessitate*, of the insurers, in the city where they reside, and for their benefit.

It is equally difficult to perceive how one person can become agent for another, as a necessary consequence of their situation, when they are both residents of the same place, and at the same time; and it is equally as difficult to perceive how the principal would be benefitted

by the conduct of such pretended agent, in taking funds out of the possession of the former.

Whether the abandonment (by the plaintiff in this action) to the insurers has been made under circumstances which will entitle him to recover, as for a total loss, can only be determined absolutely in the decision of the suit which he has instituted, and is still carrying on against them to obtain full and entire indemnity. Until the contrary be shown, we must presume that he has proceeded according to law and the justice of his case in that action, and will in the end succeed; in which event, the present defendants will become undoubted debtors to the insurance company for the value of the goods abandoned. And if the latter should prove to be their debtors, in consequence of the policies effected on the vessel and freight, compensation will legally take place between these parties; and certainly the underwriters, in anticipation, contrary to fair presumption, and without any good cause shown, ought not to be compelled to give up a debt which may be thus compensated. The confusion and contradiction created by the double pursuit against the owners of the vessel and the insurers of the cargo, to recover from the latter, indemnity for certain loss; and from the former, the property itself—have caused a more lengthy discussion of the case, than its real difficulties require, particularly relative to the second question: for scarcely any thing can be imagined more inconsistent, than a kind of agency, the avowed object of which is to transfer from the principal to the agent, property which the former has an equal, if not a greater right to hold, than the latter.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiff.

Strawbridge, for the defendants.

Robins *v.* Weeks. V, N. S. 379.

Tutors, other than those by nature, are deprived of the tutorship, *ipso facto*, by removing out of the state.

And if they take with them the minor, his domicil remains that of his origin.

The mother who loses her tutorship by marriage, and is afterwards reappointed, holds the office under the law, and not by natural right.

COURT of Probates of West Feliciana.

PORTER, J., delivered the opinion of the court.

This appeal has been taken from a decision of the court of probates in relation to a partition of the estate of Ann Eliza Weeks, deceased, who was sister of the appellee, and daughter of the appellant. The intestate died in Maryland, and the rights of the parties before us depend on the fact of her *domicil* at the period of her death. If in the state of Louisiana, the mother became heir to all the estate real and personal. If in Maryland, she only inherits the former, and the latter goes to the brother.

The father of the appellee was a native of this state, and resided in the county of Feliciana. In the year 1806, he went to Maryland, and there married the appellant. Soon after their marriage they came to Louisiana. In the years 1807 and 1808, they had two children—the intestate, and the appellee. In the year 1812, the father died; and in the year 1813, the mother returned to Maryland; but before leaving this state, she gave bond and security to return. While in Maryland, she intermarried with one Robins. This event took place in 1814, and in the year 1816, she returned to Louisiana with her second husband. They settled on a plantation belonging to the minor children. In the year 1819, the estate was given up by the executors of Weeks to the representatives of the minors. Robins, the stepfather, was appointed tutor to one of them, and curator *ad bona* to the other. He remained here until 1821, when he again went to Maryland, and took with him his wife, the appellee, and his sister. In 1823, he returned, rendered his account as tutor and curator, and after remaining five months in this state, he went back to Maryland. In the year 1824, Ann Eliza Weeks, whose estate is now the subject of contestation, died in the state of Maryland. And in the year 1826, Robins returned to this state, bringing his family with him, and since died here.

A good deal of evidence, parol and written, was introduced in the court of the first instance, to ascertain the object of these different

changes of residence:—By the one party, to show that Robins's intention was to remain a citizen of the state of Maryland—by the other, that he considered himself a citizen of Louisiana, and that his removal was but temporary; for the benefit of his own health, and the education of the children whom the law had intrusted to his care.

In this court the argument has been extended to an examination of the law of domicil, both on general principles, and the particular regulations of the state of Louisiana; but the view which the court has taken of the case, does not require an examination of these doctrines, nor, consequently, the expression of any opinion in relation to them.

Our law provides, that "the domicil of the minor, not emancipated, is with the tutor." Civil Code, 12, 7.

The same work declares, that "if the tutor shall die, or absent himself from the state, another tutor shall be appointed in his stead." *Ibid.* 64, art. 60.

If the tutorship ceases *ipso facto* by the removal, there can be no question that the domicil of the minor, whose estate is now the subject of contestation, was never changed; for, at the moment the tutor left the state with the intention of fixing his domicil permanently in Maryland, he lost the office. It followed, he had no domicil as tutor, in the place to which he removed: and if the minor resided there, she did not reside with her tutor, because he ceased to be such by removing.

But if, on the contrary, the removal did not of itself, make the tutorship cease, but merely furnished cause for removal, then the affirmative is not so clear; though even considered in that point of view, the same result would, we believe, be attained.

We think the first is the sound construction. The law says: "If the tutor die, or absent himself from the state, the judge shall appoint another." Now in case of death, it is of course, that the tutorship ceases. The provision cited by putting the case of absence with it, and directing the same thing to be done in either event, evidently contemplated the same consequences to result from both; and where the law does not distinguish, we should not.

Every motive of sound policy supports this construction. The office of tutor is not only of great importance to the minor, but the public, who are deeply interested in protecting those who are not of an age to protect themselves. Tutors, therefore, other than those by nature, who hold their appointment under the law, should not be permitted to place themselves out of the reach of the law. To suffer them to remain such, in the uncertainty that must frequently exist as to their real intention, would often cause a serious injury to the minor. It is important that if they intend to remove permanently, they should give notice to that effect; surrender the office before they depart, and have another appointed in their stead. And if they do not, it is right they should be responsible for all the injury the minor may sustain by the act of their removal, without being permitted to

enjoy any of the benefits which might result from the administration of the property entrusted to their charge.

It is proved, however, in this case, that the mother, after her marriage, was joined with her second husband in the office of tutor and curator, and that she removed also with the minors. It becomes, therefore, necessary to examine, whether she was to be considered, at the time of removal as tutor by nature, for if she was, the tutorship did not cease. It has been decided in this court, that a natural tutor has a right to take his children with him in case of expatriation, and that he does not cease to be tutor by leaving the state. 4 *Martin*, 715.

We think that the mother who marries a second time without taking the advice of a family meeting, cannot, in case of re-appointment, be considered as holding the office by natural right, but under the law.

By a provision in our Code, it is declared "that the mother who wishes to marry again must, previous to the celebration of the marriage, apply to the judge, in order to have a meeting of the family called for the purpose of deciding whether she shall remain tutor. And that if she neglect to call such meeting, she shall be *ipso facto* deprived of the tutorship."

The fact of the appointment of the mother and stepfather some time after the marriage, is proof that the mother neglected taking the advice of a family meeting; otherwise such an appointment was useless and illegal.

We are of opinion, that this appointment was not reinstating the mother in the office of natural tutrix, but the conferring of a new office; and that there was no positive obligation on the family meeting to appoint her. The tribunals in France, on legislative provisions the same as ours, have carried the doctrine still further, and decided, that "from the moment the consent of the family meeting is obtained, to the tutrix marrying again, she ceases to hold it *de plein droit*." *Paillette, Manuel de Droit Francais.* Note on the 395th article of Napoleon Code. Denevers, vol. 5, 156; Sirey, vol 7, 156.

As therefore, the tutors in the instance before us, held their appointment under the law, they could not change the domicil of the minor by moving into another state; and her property, must be distributed at her death, by the laws of her domicil of origin.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the property, real, personal and mixed, held in common between the appellee, and his sister, Ann Eliza Weeks, deceased, as heirs of the late Caleb Weeks, be partaken by the parties to the suit in equal portions; and that the case be remanded to the court of probates, to carry said partition into effect; the appellee paying costs of this appeal.

Watts and *Lobdell*, for the plaintiff.

Pierce and *Eustis*, for the defendant.

Osacar *v.* Louisiana State Insurance Company.
V, N. S. 386.

When it becomes necessary to place goods in launches to transport them from the ship to the port of destination, they are at the insurer's risk until landed.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The judgment in this case condemns the defendants to the payment of a sum insured by them, with interest from the date of the judicial demand. Both the parties complained of it. The plaintiff appealed because interest was not given on it from his first application to the defendants; and they have prayed for a revisal of the judgment, on an allegation that no proof of a loss was administered.

We shall consider the last objection first, because if there was no proof of the loss, nothing is due to the plaintiff; and consequently, it is idle to talk of interest.

The testimony and documents show that the vessel, whose cargo was insured, arrived in the roadstead at Soto La Marina, in Mexico, on the last day of July; that the town is at the distance of twenty leagues; that there is but few feet of water on the bar, and the vessel, as all others do, anchored outside; that goods are carried up to town in launches, after having been landed at a small military post inside the bar; that two launches were loaded from the vessel, and carried their loading to the town; that on the 6th of August, a tempest compelled the vessel to sail away; that the tempest increased on the following day, and she never was heard of; and it was supposed, from the quantity of broken timber that floated on shore, she was lost.

On this the district court, deducting the amount of the goods brought to town in the two launches, from the sum insured, gave judgment for the balance.

The defendants' counsel contend, that the vessel was about five days in the roadstead, and might have landed all her lading—and, perhaps, did.

We are of opinion the district judge did not err; the goods were insured to Soto la Marina, and were at the insurers' risk, till they reached that place in the launches. It is in evidence that goods are, at times, carried on mules from the port to the town; it is clear when this is done, as the insurance is a marine one, there is no responsibility for land risks—but nothing shows this was the case in the present instance.

[Osacar v. Louisiana State Insurance Company.]

It is in evidence that two launches were loaded from the insured vessel, and brought their lading to town; the defendants' counsel urges the plaintiff has not shown that no more was landed. This he could not do, for a negative can not be proved; if more was landed, the defendants ought to have shown it.

As to the interest, as there was no evidence of any actual loss at the time of the abandonment, and the plaintiff could only recover on the presumption to which the total want of any account of the vessel, during one year, gave rise; we are clear the judge acted correctly, in denying interest from the abandonment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Strawbridge, for the plaintiff.

Eustis, for the defendant.

Police Jury *v.* Hampton. V, N. S. 389.

The police jury of New Orleans may order repairs on levees at any season of the year.

Notice to the proprietor must be in the English language, if it be his mother tongue.

If the forms of the law, in giving notice, are not strictly complied with, no action can be maintained against the owner for a breach of the police regulations, but the jury may recover the value of the repairs put on his plantation if they were useful and necessary to him.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action to recover the amount of 321 dollars, paid by the parish of New Orleans, for repairs made on a plantation of the defendant.

The general issue is pleaded. There was judgment in the inferior court against the defendant, and he appealed.

It appears in evidence, that on the 10th day of February, 1822, a jury was assembled in pursuance of certain regulations of the parish of New Orleans, on the subject of roads, levees and bridges; who, after deliberation, directed that certain repairs were necessary on the plantation of the defendant.

That on the 12th day of the same month, the syndic gave notice to the appellant that if the work was not done in conformity with

the directions of the jury, it would be executed at his expense, in pursuance of the 16th article of the police regulations of the parish of New Orleans.

The defendant not having complied with this notice, the work was executed by the syndic; and it is proved, that it was done on reasonable terms, and that the work was accepted by the jury.

The defence has assumed every ground of which the case is susceptible.

It is first contended that by the 12th article of the police regulations, "the work for the levees shall begin every year in the month of July, as soon as the water is low, and shall be finished and completed by the first of November following, under penalty for every such contravention, of a fine which shall not exceed 500 dollars, nor be less than 50 dollars, at the discretion of the parish judge."

This article applies to the general works to be done on the plantations within the parish in each year; but does not prevent the police jury from ordering the construction of those that may become necessary at any intermediate space of time. The regulations would be quite inadequate to the purposes of public convenience and security, if they did not authorise repairs at any season of the year. Levees and bridges may be in a situation not to excite apprehension in the month of July, and yet become alarming and dangerous before the expiration of twelve months. That such is the sound construction of the article just cited, is, we think, clear by comparing it with the 21st, which declares "that besides the works which the inhabitants are bound to perform at certain periods of the year, they shall be at all times under an obligation to keep their ways, bridges, ditches and levees, in good repair—that they may be directed to make them, and that in their default in doing so, they shall be made at their expense."

It is further argued, that admitting these repairs to have been ordered at a proper time, notice was not given in a legal manner, and that, therefore, the defendant was not in default.

The 51st article of the regulations of the police jury, directs the syndic to issue orders in English, to the inhabitants who speak that language.

It is proved here, that the defendant speaks that language, and that the order left at the plantation was written in French.

This error, he contends, exonerates him from all responsibility.

The appellees urge, that the irregularity in giving notice, if such it be, can have no other effect, than to prevent the police jury from levying the fines which their regulations impose on those who neglect the orders they receive from the syndic; but that it does not authorise the defendant to enrich himself at the expense of others, by refusing to pay for labor, which was both necessary and useful to him.

The merits of the case turn on the correctness of the last position.

It is a maxim, common to the jurisprudence of all countries, that no one is permitted to profit by the labor of another, without compensating him for it. *Jure naturæ equum est, neminem cum al-*

terius detrimento et injuria fieri locupletiorem. On this principle, the Roman jurists held, that he who acted for another by transacting his business, or by making repairs on his property, could recover the amount of the expenses incurred, or the value of the repairs; provided the acts of the *negotiorum gestor* were necessary and useful to the person for whom he acted. This doctrine has descended to us, and makes a part of the positive legislation of the state. *Dig. liv.* 50, *tit.* 17, *l.* 206; *Ibid. liv.* 3, *tit.* 5, *l.* 10, 8, 1; *Toullier, Droit Civil Français, vol.* 11, *tit.* 4, *cap.* 1, *no.* 49; Civil Code, 2274 and 2278.

We have, then, to examine, whether the work done was useful and necessary to the defendant; and if it was, whether the neglect of the police jury to give notice, enables the appellant to profit by their labor without paying for it.

The jury having failed to give notice according to their own regulations, it is clear the defendant was not benefited by being discharged from any fine which might be affixed to a disobedience of them; or, until notified, he was not responsible for a breach of them. But that the work was necessary and useful, in discharging the defendant from the obligation imposed on him by their regulations to keep his levees and roads in good repair, and consequently in saving him from the damage to which he would have been exposed had the property of his neighbors sustained any injury, is manifest from a reference to the regulations established by the police jury.

These, from the first to the seventh article, prescribe the manner in which roads, bridges, and levees, shall be made. The twelfth, directs the time when the work shall be done; and affixes a fine for disobedience. And the sixteenth authorises the work to be done for them. The twenty-first prescribes that, "besides the work which the inhabitants are bound to perform, at certain periods of the year, by virtue of the present regulations, they shall, at all times, be under obligation to keep their ways, bridges, ditches, and levees, in good repair, and free from all kinds of filth and weeds; in order, principally that the holes which may exist in the levees be perceived. And if, after being duly required and notified by the syndic of their district, to execute the said repairs, they refuse or neglect to do so, within the prescribed delay, they shall be condemned to a fine of ten dollars; and the syndic shall cause the said repairs to be made at the expense of the defaulter, according to the sixteenth article of this ordinance."

It is a general principle, that whoever is injured by the failure of another to comply with a legal obligation, has an action at law, to be compensated for the injury he has sustained. The obligations of each riparian owner or possessor of lands within the limits of the parish of Orleans, are established in express and positive terms, by the article referred to. And any person who would suffer by a neglect of these obligations, could certainly demand and recover the damage he sustained by a breach of them. The notice required by the latter part of that article, does not create the obligation, nor impair

the right of a co-proprietor to compensation in case he sustained an injury. It is only in relation to the fine given to the public, and provides for the manner it should be enforced; but leaves the private right untouched. It proceeds on the familiar distinction between the penalty given in a prosecution on the part of the public for a breach of its laws, and the right of an individual to bring an action against him by whom the injury has been inflicted. And a failure of the police jury to pursue the formalities necessary for them to recover their fines, could no more weaken the claim of a party injured by the overflowing of the river, to obtain compensation to the amount of the damage he sustained, than an irregularity on the part of the state, in an indictment against a person who had committed an assault and battery, would affect the right of the individual assaulted and beaten, in an action which he might bring in his own name for the damages he had sustained.

Another reason fortifies this construction. The fine imposed is only ten dollars. An amount not at all proportionate to the injury that might follow. The great danger to which the lower part of this state is exposed from the periodical rise of the Mississippi, is a fact which requires no evidence in this cause to make known to the court. And if it did, the numerous regulations of the police jury, which are in proof before us, would establish it. It can not be believed then that those to whom this important branch of police is intrusted, intended no other penalty should follow a neglect of regulations which might put the surrounding country under inundation, and ruin the crops of their neighbours, than the sum of ten dollars. It is rather to be presumed, this was added to the heavy obligation which responsibility to individuals created.

If such were the obligations imposed on the defendant, the danger to which he was exposed by leaving his levee out of repair was great, and the work done can be regarded in no other light, than useful and necessary to him. He is a resident of South Carolina. His plantation was uninhabited, and he had no agent here; or if he had, there is no proof of that fact. The repairs made by the appellees, we are bound to believe, prevented the plantation of the appellant from inundation, and saved him from the responsibility he would have fallen under to his neighbors, had their property been injured by his fault.

He should, therefore, pay for the labor by which he was benefitted; and it would be unjust that, in this matter, he should enrich himself at the expense of others.

This doctrine does not in any manner impugn that on which the case of Bouligny *v.* Dormenon *et al.* was decided in this court. There the proprietor interfered before the contract made by the police jury had been carried into effect, and he succeeded, because the regulations for the construction of the levees had not been promulgated, and were not binding on the inhabitants of the parish. Here the obligation existed, in virtue of rules which had the force of law. The contract has been executed, and the question is not what would have

been the right of the appellant had he come forward to prevent the work being done. It is possible he might have chosen to brave all the consequences, and let the plantation remain without proper levees until duly notified. But his responsibility now can not be tried by that test. It is by a reference to his duties, and to a presumed obedience to them, had he been there, that the rights of the *negotiorum gestor* are to be ascertained. Such an argument might be used in any and every case, and would render the whole doctrine of our law on this subject useless, and of no effect. *Si quis absentis negotia gesserit, licet ignorantis; tamen quidquid utiliter in rem ejus impenderit vel etiam ipse se in rem absentis alicui obligaverit, habeat eo nomine actionem. Dig. Lib.* 3, *tit.* 5, *No.* 2.

The failure of the police jury to give notice, can not defeat this action. It is founded on the great principle of equity, that no man shall profit by the labor of another without compensation; and neither error, nor bad faith, on the part of the *negotiorum gestor*, will prevent him recovering the amount to which he has benefitted another, if the work done was useful and necessary. *Dig. Lib.* 3, *tit.* 5. *No.* 6, 83.

It has been decided in this court, that a sheriff might recover on a *quantum meruit* for keeping slaves, although he had not strictly complied with the law, and could not sustain an action in his official capacity. 3 *N. S.* 576.

The judgment of the district court should, therefore, be affirmed, with costs.

Moreau, for the plaintiff.

Preston, for the defendant.

Dorsey *v.* His Creditors. V, N. S. 399.

The estate of an insolvent may be taxed with the fee due the attorney who filed the *bilan*.

But the compensation cannot exceed 250 dollars.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The syndics being cited to show cause why they should not pay

to the attorney of the insolvent, 1000 dollars for his professional services in this case, as a privileged debt, out of any moneys in their hands, denied that the sum was due.

A gentleman of the bar deposed, that having seen and examined the proceedings, and taken into consideration the importance of the transaction, and the trouble the attorney must have been at—the whole having as it appears, been managed by him—he thought an allowance of 1500 dollars for his services, but reasonable.

Two others deposed: the sum claimed is, in their opinion, a moderate one, according to the amount claimed and allowed for similar services.

The rule was made absolute, and the syndics appealed.

Their counsel argues in this court, that the allowance is extravagant.

The attorney contends that there is neither bill of exceptions, nor statement of facts, &c. that may enable this court to act on the merits of the case; and that there is nothing in the decision appealed from, contrary to law or evidence.

It does not appear to us that there is any substance in the first objection of the appellee, as the testimony appears to have been reduced to writing in court. His second, and that of the appellants, will be considered together.

We have recognised the right of the attorney of a ceding debtor to a remuneration out of the ceded property (to be taxed by the court) for that portion of his services which is beneficial to the creditors. Morel *v.* Mezotiere's Syndics, 3 *Mart.* In that case, the legality of the demand was also contested; its *quantum* was not contested.

It is not for all the services rendered by the attorney to the insolvent, his client, that the syndics are to be charged; but only for those from which they derived a benefit, as the filing of the petition for the cession, and of the meeting of the creditors. If, afterwards, a contest arises, as it may, between the insolvent and the syndics, as when he claims, and they oppose his discharge, the latter cannot be charged with the fees of their own attorney and that of the debtor's, who act in opposition to them.

As the services to be thus compensated are rendered under the eye of the court, the taxation ought to be made on its own responsibility, which ought not to be shifted from the bench on the bar, as it appears to have been done in this case, in which the decision is made on the opinion of attorneys, that the charge is moderate, and but reasonable.

In the present case the appellee filed the petition, and obtained the order for a meeting, at which he attended his client. Afterwards, none of the creditors making any opposition, he moved for, and obtained the homologation of the proceedings of the meeting, and the discharge of the insolvent; and made the motion for, and obtained the allowance complained of.

The measure of the reward of professional service, is the exertion

of legal knowledge, the responsibility incurred, and the labor bestowed.

Few, indeed, are the cases in which an attorney has less legal knowledge to exert, or labor to bestow, than in an application for a meeting of creditors. Indeed, a blank petition would answer in every case, and require only the filling up the blanks for names, places and dates. The amount of property or debts, active and passive, however great, does not render the responsibility incurred much so. A suit, on a plain note of hand, demands more exertion of legal knowledge, and imposes a greater responsibility.

It would not be, therefore, easy for a judge, even if the opinion of witnesses was to relieve him from responsibility, to come to the conclusion of the first witness, that 1500 dollars would be but a moderate compensation for the appellee's services. In this state, the services of the law officers are as liberally estimated, perhaps more so, than in any other in the Union;—yet, till very lately, this sum was deemed a fair annual compensation of the attorney-general, and some of the district judges.

A prosecution of the lightest misdemeanor demands from the attorney-general, the exertion of more legal knowledge, and imposes more labor and responsibility, and consumes more time, than all the services of the attorney of an insolvent, for which the creditors are to be taxed. Yet, except in the first appointment of an attorney-general of the state, (of which it does not behoove the member of this court, who has now the honor of being its organ, to speak,) gentlemen of great merit have easily been found to fill the office—no one ever refused it, or resigned it, except on a call to another, and more dignified office.

Vastly different, indeed, must be the measure of compensation in the legislative and judicial departments of this state, if the sum which is deemed by the former a fair compensation for the attention of the attorney-general to all state prosecutions, and to the call of state officers for opinions during one year, and for the services of a district judge during the same period—be considered by the latter, as but reasonable for the services now under consideration.

The two other witnesses consider the demand as reasonable, according to what is claimed and allowed in similar cases. Now the allowances referred to by the gentlemen, are those made by inferior judges. When the present allowance is complained of on the score of extravagance, the appellate court cannot sanction it because decisions, equally erroneous, have taken place before by judges *a quibus*. The judge *ad quem*, cannot take the opinion of the one *a quo*, for his rule of decision.

Leaving aside the opinion of witnesses, the judge below ought to have acted on his own responsibility, as in the case of taxing the services of referees, or the attorney of absent creditors.

In the latter case, however, which is a parallel one to the present, the legislature has not left the creditors absolutely at the discretion of the judge. It has fixed the maximum of the compensation they may

be taxed for. The remuneration of this gentleman is contingent—for it is payable out of a special fund alone, the part of the ceded estate coming to the absent creditors. It cannot in any case exceed 2½ per cent. and is to be reduced to 250 dollars, if this per centage exceed that sum. Acts of Ass. 1817.

Now, it is not doing any injustice to the appellee to consider his and that case parallel ones. The services of the attorney of the absent creditors, demand the exertion of more legal knowledge, more labor, and impose a greater responsibility, than those for which the appellee may claim compensation. The absent creditors are to be informed of the failure—the claim of any of them, if greater than admitted by the insolvent, must be supported—that of any present creditor must be examined, and if excessive, attempted to be reduced, and the conduct of the syndics must be watched.

As in algebra, unknown numbers must be sought by comparisons of known ones—so, in law, the just decisions in cases in which the legislator is silent, must be sought in an analogy with those in which he has spoken. Thus in taxing professional services, in cases of insolvency, when the will of the legislator is expressed on any occasion, it cannot be disregarded in a similar or analogous one. After taxing, according to the statute, the services of the attorney of the absent creditors at 250 dollars, or less, a court cannot well tax those of the attorney of the insolvent, evidently requiring less exertion of legal knowledge, less labor, and imposing less responsibility at 1000 dollars —the fourfold of the maximum.

The administration of justice in this state has laid under some opprobrium, as to the dilapidation and waste by law charges of the estates of the deceased and insolvent; and this tribunal ought not to refuse its interference, when in a particular case it is sought for relief of the injured. When in prescribing the mode of administering those estates, the legislature strongly recommends moderation and economy, the courts ought not to run into the opposite extremes of profusion and waste.

We think the district judge erred.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and proceeding to give such judgment as, in our opinion ought to have been given below, we have not deemed it inconsistent with our duty to allow the maximum of the compensation of the attorney of absent creditors, as the amount of property ceded, and active and passive debt is in this case very large; and the debtor has by a very early cession, manifested a sincere disposition to diminish as much as in him lay the loss of his creditors; a line of conduct which we are not unwilling to attribute in some degree to the honest advice of the appellee: it is, therefore, ordered, adjudged and decreed, that the syndics pay him out of any funds in their hands, two hundred and fifty dollars, with costs below, and that he pay costs in this court.

Eustis, for the syndics.

Pierce, in *propria persona*.

Bowman *v.* Flower. V, N. S. 407.

When one of the judges of the Supreme Court is unable to sit in a cause and the other two differ in opinion, no judgment can be rendered, nor is that of the court below affirmed by the failure to reverse.

FIRST District.

PORTER, J., delivered the opinion of the court.

The presiding judge of the court being connected by affinity with one of the parties, declined trying it. The other judges by whom the cause was heard, being divided in their opinion, no judgment could be pronounced.

An application is now made by the appellee to have the judgment affirmed on the ground that as there is not a majority of this tribunal willing to reverse the decree of the court of the first instance, it remains with the same force and effect as if no appeal had been taken.

We are both of opinion the demand cannot be acceded to. The application is, it is true, supported by the usage in common law countries on a writ of error, where nothing is drawn into examination, but matters of law, and where, as the counsel has correctly said, the question put is, "shall the judgment of the court below be reversed?" But in this state the appeal opens the whole cause on the merits, and the question with us is not whether the judgment below shall be reversed, but whether the plaintiff shall recover or not.

The act of 1825, which provides that on the judges recusing themselves, the judgment of the court below shall be provisionally executed, is a clear expression of legislative opinion, that such an act was necessary, and that without it an appeal pending in the court which could not be tried, would neither affirm the judgment below nor enable the appellee to execute it. We have been unable to find any thing in our law, which will authorise us to say, that a less number than a majority of the court, can pronounce judgment for or against either of the parties; and we think that until that is done, the judgment below, which is opened by the appeal, remains so, and cannot have the force of *res judicata*.

The legislature has only provided for the judgment below being provisionally executed in two cases—an appeal without security, and the judges recusing themselves. We cannot extend it to a third.

The rule must be, therefore, discharged.

Watts and *Lobdell*, for the plaintiff.

Woodroof, for the defendant.

Milne *v.* Davidson. V, N. S. 409.

A contract to rent a house for a purpose forbidden by a city ordinance is illegal, and cannot be enforced in a court of justice.

The authority of the corporation of New Orleans, to prevent or abate nuisances, is of a very extensive nature, and a strong case of abuse must be shown to induce the court to interfere with its exercise.

FIRST District.

PORTER, J., delivered the opinion of the court.

The parties to this suit, on the 13th July, 1824, entered into the following agreement:

"Alexander Milne agrees to let to Doctor Richard Davidson, the premises the said Davidson now occupies, as a hospital, at the corner of Levee street and Marigny's canal, for the term of twelve months, commencing on the 15th July, 1824, and ending on the 15th July, 1825, for the sum of 1000 dollars payable quarterly."

There existed, at the time of this agreement, an ordinance of the city of New Orleans, which prohibited the erection of a private hospital within its incorporated limits, and, in consequence thereof, the defendant was expelled by the municipal authorities from the premises.

The court below was of opinion, that as the agreement was made in opposition to, and in violation of a positive law, the plaintiff could not recover. From the judgment rendered in conformity therewith, he has appealed.

The case has been heard in this court *ex parte;* the counsel for the appellee not appearing.

The 157th article of our Code declares,—"that all things that are not forbidden by law, may legally become the subject of, or the motive for, contracts." Civil Code, 1757.

It follows, therefore, that those things which are forbidden by law, cannot become the subject of, or the motive for, contracts.

The appellant contends, in the first place, that those expressions in our Code refer to contracts passed in violation of the general law of the land, not to those which are made in opposition to the rules and regulations of particular corporations.

The force of this distinction is not perceived by the court. The ordinances of corporations, while acting within the powers conferred on them by the legislature, have as binding an effect on the particular members of that corporation, as the acts of the general assembly have on the citizens throughout the state; and it is as much a breach

of duty to evade or violate the one, as it would be to evade or violate the other. The moral and legal obligation to obey them is the same, and the consequences of non-obedience, ought to be the same.

But the defendant has more seriously urged, in the second place, that this ordinance is one which the city council had no authority to enact; and that, consequently, it was not illegal for the parties to violate it.

An act of the legislature, passed the 14th of March, 1826, gives to the mayor and city council, full power and authority to make and pass such by-laws as they shall deem necessary to maintain the cleanliness and salubrity of the city. 3 *Mart. Dig.* 224, 226.

In opposition to the strong support, which the case of the appellee derives from the extensive power conferred on the municipal authority by this legislation, the defendant has contended, that the ordinance violates natural right; and he has sustained the general reasoning which he offered to the court, by cases determined in New York, and England, where it was held, that the fears of mankind, although well founded, did not justify a court of justice in ordering the object which excited their apprehensions to be abated as a nuisance.

The natural right to the enjoyment of property, in opposition to the positive regulations of society, is a subject of little utility in a court of justice. It is true, that the right to acquire property may be regarded as one of those which is inherent in man; but this right which took its rise in the law of nature, has received its perfection, and had a permanency given to it, by municipal or civil law: and it is in relation to this law, that the right of individuals, to the possession and enjoyment of things, must be examined. The modifications which legislative power may make in the possession, use, and distribution of property, are infinite, and nearly every contest which arises in courts of justice, proceeds from the real or imputed violation of some one of those modifications; any one of which, might be urged to be a violation of natural law, with as much reason as that of which the appellant now complains. Our Code defines absolute ownership to be, that which gives the right to enjoy, and to dispose of one's property in the most unlimited manner; provided it is not used in a way prohibited by laws or ordinances. Civil Code, 483.

The cases read by appellant's counsel, from the common law books, certainly go to show that an establishment, such as that contemplated by the parties to this action, at the time the lease was made, would not be illegal in countries governed by that jurisprudence. But the authority of the city council to make the regulation complained of, cannot be tested by the principles of the common law in relation to nuisances. No such guide is given to them by the charter. No such limit can be inferred from the motives which we must suppose induced such a grant of power, nor from the language by which it is conferred. The police of cities requires many regulations which grow out of their situation, their climates and their population; and

many things which would not amount to a nuisance at common law, might be hurtful here. An illustration of this may be found in the general recourse to quarantine regulations in warm climates, and the rare resort to them in cold ones. In a city like ours, where a dreadful epidemic, frequently returning, checks its growth, and occasions a great mortality among its citizens, too much care cannot be taken to remove the causes which give rise to it. We have no doubt that the spirit and intention of the act of the legislature was (as its language indicates) that an extensive discretion should be vested in the city council. A much stronger case than that now before us, must be presented, to induce this court to interfere, and say that regulations, having for their object public health, were beyond their power because they are contrary to our ideas of expediency.

Being, therefore, of opinion, that the city council possessed the authority to prohibit the erection of private hospitals; it follows, that an agreement, made in direct violation of it, cannot be enforced in a court of justice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Preston, for the plaintiff.

Smith, for the defendant.

EASTERN DISTRICT, MARCH TERM, 1827.

Dufau *v.* Degruys. V, N. S. 416.

The vendee of a tract of land to which was attached a right of pre-emption of the land in the rear, and who, while in possession, bought the same from the United States, remains the proprietor thereof, though the sale to him of the front tract be subsequently rescinded.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover a tract of land which was purchased by one Deflechier, as owner of the front tract on the Mississippi, in pursuance of a preference granted by the laws of the United States to front proprietors, in purchasing land immediately in the rear of their possessions; and which was sold by him to the defendant, in whose favor judgment being rendered in the court below, the plaintiff appealed.

The evidence of the case, as gathered from the record and documents therein referred to, seems to establish the following facts:—The appellant sold the front tract of land to Deflechier, on the 8th of February, 1822, together with a number of slaves, as mentioned in the act of sale, the price stipulated for the whole property being 69,000 dollars; 3000 of which were paid as acknowledged by the seller, and the balance to be paid in annual instalments; while Deflechier owned and held the tract thus purchased by him, viz:—on the

19th of March of the year above stated, he applied for, and finally purchased and paid the price of the land in the rear of the plantation which he then held as owner; and, afterwards, on the 18th of September in the same year, sold it to the defendant, by act under private signature. On the 12th of June, 1823, Deflechier failed, and made a cession of his property, &c. The sale from Dufau to him has been rescinded in consequence of the non-payment of the price; and under this rescission, he now claims the property in dispute, as being an accessory or appendage to, and legally inseparable from, the front land, of which he is owner.

The only question of law, which arises out of these facts, must be solved by an interpretation of the acts of Congress on the subject of pre-emption, in relation to the sale of the lands of the United States.

The law, under which the purchase was made, is found in an act of 1820, which revived and continued in force for two years, the 5th sect. of the act passed in March, 1811, which granted a preference to owners of land bordering on water courses, in becoming the purchasers of vacant land immediately in the rear of their front tracts. This right of preference or pre-emption, so long as it existed merely as such, and was not consummated by actual purchase of the back tract of land, remained an accessory and appendage of the front tract; but we are of opinion, that the moment the purchase was completed, it ceased to be any longer appurtenant and appended to the front property; and was held by the purchaser in separate, complete and full ownership, and might legally be sold as separate, distinct and independent of the land in front. Until the rescission of the contract of sale, Deflechier must be considered as owner of the property sold; and while he was owner, he made the purchase of the premises in dispute, and has since transferred them to the appellee.

Under these peculiar circumstances of this case, the plaintiff appears with little strength indeed, in support of his present claim, as he suffered almost the whole term, limited for the exercise of the right of pre-emption, to elapse while he was actual owner and possessor of the front tract.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Lockett, for the plaintiff.

Grymes, for the defendant.

Roberts *v.* Kinchen *et al.* V, N. S. 419.

The expiration of the office of a curator, does not prevent the execution of a writ issued in his name while he legally represented the estate.

EIGHTH District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff obtained an injunction to stay proceedings on an execution which had issued on a judgment rendered against him in favor of one of the defendants, as curator of the estate of Gerrard Morris. On hearing the cause, the injunction was dissolved, and from the judgment of dissolution the plaintiff appealed.

The case comes up on a statement of facts, and bill of exceptions to the opinion of the judge *a quo*, by which he refused a continuance of the cause. But as the evidence, for want of which the continuance was prayed, appears to be admitted in the statement of facts, it is now unnecessary t o inquire into the correctness of the proceedings by which the defendants were ruled to trial.

The statement of facts shows, that Morris, the intestate, died in the state of Georgia; that one Baylys was appointed administrator of his estate, and guardian of his minor children in that state; that he came to the parish of St. Helena, in this state, where certain negro slaves were delivered to him, as belonging to the estate of which he had obtained administration in Georgia; and that he sold and delivered these slaves to the appellant.

It is further shown by the statement, that Baylys, on his return to the state of Georgia, was removed from both his offices, of administrator and guardian, and another person appointed in his place; and that after the trial of the cause of Kinchen, Curator, *v.* Roberts, and the issuing of the execution, Kinchen settled up his account of curatorship; and was discharged from his trust by the probate court of St. Helena.

The only question which we deem worthy of consideration arising out of these facts is, whether the sheriff can legally proceed in the execution of the writ, after the disability of the plaintiff in the former suit, occcasioned by his discharge from the office of curator. The capacity of Kinchen as curator, to sue and obtain judgment at the time it was rendered, cannot now be questioned, as no appeal was taken on that trial. It is true, the present proceeding purports to be instituted with the intent of having that judgment avoided by an action

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of nullity; but the evidence of the case shows no cause of nullity, as laid down in our Code of Practice. See Code of Prac. p. 204 and 206.

The execution was awarded at a time when it could legally issue, and when there existed no impediment against carrying it into complete effect, except that which was raised by the defendant in consequence of the present suit for an injunction; which appears to have been wrongfully sued out, and was subsequently discharged. If this delay in proceeding on the execution, occasioned by the conduct of the plaintiff in the present action, should be considered a sufficient cause to destroy entirely the effect of the writ, it would be suffering the party to take advantage of his own wrong, which ought never to be allowed. The decision in favor of the curator seems to settle the right of property in the slaves to be in the heirs of Morris; and if under that judgment they be taken out of the possession of the defendant, he will be released from all responsibility to the legal owners; and, consequently, has nothing to fear from any pursuit which they may hereafter improperly institute against him. As the term of the curator's office has expired, perhaps there is now no person legally authorised to receive the property from the hands of the sheriff; but this is a matter that cannot in any manner affect the interest of the present appellant, as he can no longer be bound as owner.

We are, therefore, of opinion, that the execution is properly let loose by the dissolution of the injunction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Christy, for the plaintiff.

Watts, for the defendants.

De Flechier's Syndics *v.* Degruys. V, N. S. 423.

An act *sous seing privé*, not followed by actual delivery, has no effect against third persons.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

In this suit the syndics claim, as belonging to the estate of the insolvent, a certain tract of land described in the petition, being the same claimed by Dufau, in a case recently decided in favor of the

defendant. In the court below, the judgment was against the plaintiffs, from which they appealed.

The right of the insolvent is no longer in contest; but the transfer of property from him to the defendant is attacked as illegal and fraudulent. The act of sale, under which the latter claims, is a deed *sous seing privé*, bearing date of the 18th September, 1822; and the *cessio bonorum* of the insolvent, the vendor, took place on the 12th of June, 1823.

To destroy the validity of this sale, the appellants rely on the 228th Art. of the old Code found at p. 236; and also on a principle recognised by writers on civil law, that private acts have no date against third persons.

The verity of the date of the private instrument in the present case, is established by testimonial proof; and the legal effects of such instruments, when accomplished by actual delivery to, and possession of the vendor, on the rights and claims of third persons, have been settled in two cases, lately adjudged in this court.—See the case of Doubrere *v.* Syndics of Grillier, 2 *Martin, N. S.* 171; and that of Martinez *v.* Layton & Co., 4 *N. S.* 368. In the first of these cases, the contest was between the syndics, and the plaintiff who had been seized as a slave belonging to the estate of the insolvent, and who insituted the suit for the purpose of being restored to the state and standing of a freeman, which he had enjoyed by virtue of a contract with his late master, made and rendered by acts under private signature alone, which had not been recorded in the office of a notary public.

After much deliberation, and strict examination of the best commentaries on the articles of the Code Napoleon, which relate to the effects of acts *sous seing privé*, on the right of third persons, and which are in part similar in their provisions to several of the articles in our old Code on the same subject; the court decided in favor of the liberty of the plaintiff, though supported only by private contract. That decision was based principally on the ground of the actual possession and enjoyment of freedom by him, and proof of payment of the price for which he obtained it; these circumstances having established a date to the contract, and exhibited the whole transaction entirely free from fraud or prejudice to the creditors of the insolvent. The rights of second purchasers or mortgage creditors, were not considered in that case, as the matter in dispute did not require any decision in relation to such rights; but in the subsequent case they were examined, and the construction given to our laws on the subject, was against the claim of a mortgage creditor, who insisted on the nullity of an act *sous seing privé*, in pursuance of which the vendor took possession of the immovable property which was sold by it previous to the enregistering of the mortgage under which the lien was claimed.

In both these cases it seems that the validity of the deeds under private signature, was mainly supported in consequence of the de-

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livery of the thing sold to the purchaser, and his actual possession under the private act of sale.

The 228th article of the old Code, invoked in favor of the claims of the syndics, is continued in force by the Louisiana Code, with an addition, conforming to the decisions above cited, which gives effect to sales or exchanges of real property from the time of the actual delivery of the thing sold or exchanged.

It does not appear from the evidence of the present case, that actual delivery was ever made of the land to the vendee of the insolvent; we are, therefore, of opinion that as it respects the creditors of the latter, the sale bein gunder private signature, and not registered as required by law, must be considered as null and void; and the property intended to be conveyed by it, decreed to be, and make a part of the mass of the insolvent's estate, &c.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiffs and appellants do recover the land in dispute, as a part of the estate of the insolvent De Flechier: and that the appellee and defendant pay costs in both courts.

Carleton and *Lockett*, for the plaintiffs.

Grymes, for the defendant.

M'Micken *v.* Smith and Wife. V, N. S. 427.

Service of citation of appeal on the attorney of the appellee, is not sufficient, unless it is shown the latter was absent from the state.

Nothing will cure want of citation, but appearance and pleading to the merits.

It is not a good service of a citation of appeal, that it may be made on a curator *ad hoc* when the party dies *pendente lite*. His heir should be cited.

Married women cannot, under any circumstances, become sureties for their husbands.

THIRD District.

PORTER, J., delivered the opinion of the court.

The defendants and appellees move to dismiss this appeal, because there has been no service of the citation to this court.

The evidence of service is contained in an affidavit of the deputy sheriff, written on the back of the citation; in which he states, "that

he did deliver a copy of the citation, together with a copy of appellant's petition to Archibald Haraldson, the counsel of defendant, on the 31st May, 1826, and on the 3d day of June, 1826, also delivered to Margaret Smith, one of the defendants, a copy of this citation, together with a certified copy of appellant's petition.

The 582d article of the Code of Practice directs, that the sheriff shall serve the petition and citation of appeal on the appellee, if he reside within the state, or his advocate if he do not, by delivering a copy of the same to such appellee, or his advocate, or by delivering it at the place of his domicil.

The directions of this article, have not been complied with in the case before us. The return shows service on the attorney of the defendant; and the record affords no evidence that he was at that time absent from the state.

Several reasons have been urged, to show that the appellee is properly before us.

1. That the service being made on the wife, who, by law, is obliged to reside at the domicil of the husband, the presumption is, the latter had notice.

2. That the record shows, the defendant was absent from the parish in the year 1825, and there is no evidence given that he had returned before June, 1826, when the citation was served.

And, lastly, that the appearance of the defendant in this court so soon after the return day, confirms these presumptions.

I. The court can presume nothing in relation to a party being cited. Constructive notice will not do; nor even actual, unless given in the manner prescribed by law. Proof, by any number of witnesses, in a court of the first instance, that the defendant was informed a suit was pending against him, would not authorise a judgment by default. Nothing will cure the defect of a want of citation, but appearance, and pleading to the merits.

II. Proof, that the appellee was out of the parish in 1825, is not proof that he was out of the state in 1826; nor does it afford the slightest presumption of the fact.

III. The appellee had a right to come into this court to point out the defect in the process, and prevent the proceedings which might have been had on the record, had not the attention of the court been drawn to the want of citation; and his appearance here for that purpose, cannot be construed a waiver of the objection.

We cannot examine the correctness of the judgment in relation to the appellee, who was regularly cited; for she is a married woman, and must appear here with her husband or by his authority.

The opinion just delivered, was that formed on the record as it was before us on the first argument. After this argument, and before judgment was pronounced, the plaintiff suggested a diminution of the record, and obtained a certiorari to complete it. A return has been made to this writ, and it appears that previous to the decision of the case in the district court, on the death of one of the defendants being

shown, it was ordered that Archibald Haraldson be appointed curator *ad hoc* to represent the interests of the defendant during the pendency of the suit.

The curator *ad hoc*, is the same person on whom the appeal was served. But we do not think the case of the appellant is made better by the disclosure of this fact. Our Code of Practice requires, that if the defendant should die after issue joined, his heir must be cited. This is what should have been done here, and until it was done, judgment could not have been regularly given in the district court against the succession of the deceased.

It is said the court must presume the wife was the heir. If such were the fact, the appointment of the curator was irregular and void; for she was present and in court. But that appointment negatives this presumption, if indeed it can be called one; for if we were at liberty to presume any thing in the matter, we should rather suppose the deceased did not die without either ascendants or descendants, or collateral relations.

But the death of the husband removes the objection, that the wife could not appear in court without him; and, consequently, the case, as to her, must be examined on the merits.

We have done so, and it appears from the evidence, that the notes on which this suit was instituted, were given, in part for negroes sold to the husband, and in part for a balance then due by him on another obligation to the plaintiff. They cannot, therefore, be enforced against the wife. It has been more than once decided in this court, that a married woman could not, under any circumstances, become surety for her husband; and that this prohibition could not be avoided, by giving to the contract the form of an obligation *in solido*. Durnford *v.* Gros and Wife, 7 *Mart.* 484; Bank *v.* Trudeau, 2 *N. S.* 39; Tremé *v.* Lanaux's Syndics, 4 *N. S.* 230.

It is, therefore, ordered, adjudged and decreed, that this appeal so far as it relates to the estate of John Smith, one of the appellees, be dismissed, with costs.

And it is further ordered, adjudged and decreed, that the judgment of the district court, in favor of the other appellee, Margaret Smith, be affirmed, with costs.

Preston, for the plaintiff.

Watts and *Lobdell*, for the defendants.

Jewett *v.* Davis. V, N. S. 432.

The publication in the State Gazette is not a promulgation of the acts of the legislature, pursuant to the provisions of the Louisiana Code, arts. 4, 5, 6, 7.

Three days after the laws are sent to the clerk of the parish in which the seat of government is held, they are to be considered in force there, and thence in the other parishes at the interval of one day for every four leagues, according to the sixth article of the new Code.

FIRST District.

PORTER, J., delivered the opinion of the court.

This case was heard in last June term, and judgment pronounced. On the application of the appellant, a rehearing has been granted, and it has been again argued.

The cause commenced by attachment, and was dismissed in the court below, for want of a sufficient affidavit. It presents two questions:—First, whether the oath of the plaintiff be proved to us by legal evidence? And, Secondly, whether the want of an affidavit by him, is supplied by that of his agent?

That of the principal is evidenced by a certificate of the mayor of the city of New York, with his seal annexed, and we are clearly of opinion that it is not legal proof of the fact which it is offered to establish. We have no particular knowledge of either the seal, or handwriting of the mayor of New York, and to admit inferior evidence of this kind, would open a door to numerous frauds. The plaintiff's counsel is correct, in stating that this is a document which need not be authenticated according to the acts of Congress. We have already decided that point. But it is defective on general principles of law. The seal of the state should have been added, or proof given of the seal of the mayor, and of the handwriting. Woolsey *v.* Paulding, 9 *Mart.* 280.

A correct solution of the second question depends on ascertaining the period at which the late law, amending the Code of Practice, was promulgated. If it was in force at the time the affidavit was made, the plaintiff contends it was such as the amendment authorises. The defendant insisted that, even supposing the act to have been in force, the affidavit is not according to law; but he principally relies on the argument, that at the time the oath of the agent was made, the act was promulgated.

On the hearing of the rule, taken to dismiss the attachment, the plaintiff introduced the Louisiana State Gazette of the 13th April, 1826, containing an act, entitled "An act to amend the Code of Practice of the State of Louisiana," &c.

The counsel for the appellant has argued, that the law is in such a state of confusion, the court may adopt any construction which it thinks most useful and convenient. That our legislation, in regard to the promulgation of the laws, is confused and embarrassing is undoubtedly true; but this circumstance, though it increases the labor of the court, does not diminish its obligation to endeavor to find out what the will and intention of the legislature was, and enforce it, even though it did not coincide with our notions of utility. But it is believed that the opinion we entertain, eminently promotes the object which the counsel seems to think should guide the court in interpreting the laws that have been passed on this subject.

The Civil Code has provided, "That laws cannot be obligatory without being known; that they shall be promulgated by the governor of the state."

"That the laws shall be directed to the authorities entrusted with their execution; and to such other persons as the law has designated, or may designate in the form or manner which is or may be prescribed to insure their publicity."

"The clerks of all the courts of justice of this state, shall insert in a registry, to be kept for that purpose, the titles of all the laws which shall have been directed to them, together with the day on which they shall have received them." Civil Code, art. 4.

By the fifth section of an act, supplementary to an act, entitled an act, further and more effectually to provide for the public printing, passed the 12th December, 1816, it is made the duty of the governor, for the time being, immediately on the delivery of the laws into the office of the secretary of the state, to cause said laws to be distributed, and sent to the parish judges of the different parishes, by them to be delivered to such persons in their parishes, as may be by law entitled to them. Acts of 1817, p. 6.

Now, although these enactments do not positively exclude publication in the newspapers, as a means of promulgation, yet the whole of them taken together, would seem to leave little doubt that such a mode was not contemplated by the legislature. The governor is directed to promulgate these laws, by delivering them to the different officers charged with their execution. This direction most certainly negatives the idea, that sending them to the public printer to be printed, is a promulgation; for he is not one of those persons charged with their execution or application, and *non constat* that one half of the officers in this state take his paper. The printer prepares the laws for promulgation by multiplying the copies of the acts which are transmitted to him in manuscript, and the act of the governor which forwards them to him, cannot, without doing great violence to the plain meaning of the words used in the Code, be construed a forwarding to the persons entrusted with their execution. The clause which orders the clerks of the several courts to record the day on which the statutes are received by them, supports this interpretation. No possible reason can be assigned for such a direction, unless it was

to ascertain some certain time at which the laws were promulgated, and if they were previously promulgated by a publication in the newspapers, such a direction was useless and absurd.

There is still another consideration. If it had been the intention of those who made the law, that publication in the newspapers was promulgation, can it be believed that so many provisions would have been introduced, and such particular directions given about the governor forwarding them to officers charged with their execution, when the whole object could have been attained by simply enacting, "that the laws shall be promulgated, by publication in the State Gazette."

We have, in some measure, a construction of the legislature on their own acts on this subject. In the year 1817, it was deemed important to promulgate the law, amending the acts enacted to organise the courts of this state, and for other purposes, earlier than it would have been by the usual mode. A resolution was accordingly passed, by which the governor was requested to have 150 copies of it printed without delay; and he was required to promulgate the same, by forwarding immediately to each of the clerks of the supreme and inferior courts of this state, and to the several judges of the district and parish courts, a copy of the law. This direction was wholly unnecessary, if the ideas of the appellant in relation to this matter be correct. The object of the legislature would have been attained by a publication in the State Gazette, and more speedily than it could have been in the mode to which they resorted.

The great error of the argument by which this interpretation is resisted, arises from confounding publication, with promulgation. These words in common parlance, are nearly synonymous. But when applied in a legal and technical sense, to give such publicity to laws, as that no one can plead ignorance of them, it does not follow that every publication is a promulgation.

This construction does no violence to the sixth article of the Code. Three days after the laws are sent to the clerk of the parish where the seat of government is held, they are considered in force there, and thence in the other parishes at the period therein prescribed, that is, one day for every four leagues. It is not seen what greater objection can lie to implying a knowledge from promulgation in this way, than there would be to a promulgation by printing in the newspapers.

This question was brought before the court in the case of St. Avid *v.* Weimprender, and it was there held, that the act of the governor, promulgating the laws, was necessary to enable a court of justice to execute them. In the opinion delivered, it was said—"If, without his act, the laws be promulgated and become known, the execution is not to take place, till the directions of the Code be complied with."

The point actually decided in that case, does not go the whole length of that now before us for decision; but this reasoning of the court shows satisfactorily the view then taken of the matter, and that the promulgation must come through the executive.

It has been strongly pressed on us, that publication in the newspa-

pers could have been directed for no other purpose, but that of promulgation, and that the construction adopted by this court in its former judgment, is highly inconvenient.

We think an important and highly beneficial object was contemplated to be attained by the legislature, in directing the laws to be printed in the newspapers, and that that object was not promulgation. It has been a matter of serious concern to nearly all legislators, to provide means for making their laws known, before men were bound by them, and different modes have been resorted to in different countries, to accomplish this. In none has it been completely attained, and from the ignorance and inattention of mankind, it never can be completely attained. No matter what precautions are taken, there will still be many whose conduct and pecuniary interests must be governed by laws, of which they are ignorant. But this very circumstance furnishes the strongest reason why all possible publicity should be given to laws before men are bound by them. There cannot, perhaps, be a better mode devised to attain so desirable an end, than that which the legislature of our state seems to have adopted, namely:—to publish them first in a newspaper, and then let some time elapse for the knowledge of them to spread through the community before they are officially promulgated, and made binding on the citizen. By this means the communication of actual knowledge is, as far as practicable, reconciled with the public interest; which will not permit that, after a certain time, any one should plead ignorance of the law.

It has been urged, that the governor sending the acts of the legislature to the district court in New Orleans, is a very bad mode of giving notice to a distant parish, that the laws are promulgated. But this argument overlooks the important fact, that the laws have already had publicity given them; and that the object of this promulgation is rather to fix a particular time at which they shall be in force, than to give a knowledge which is supposed to be already communicated by publication. This, however, applies with almost equal strength to the position assumed, that publication in the newspapers gives such publicity, as that every citizen can know what laws are enacted.

It is no doubt that it is almost impossible by any legislation to attain the most desirable end of bringing home the knowledge of the law to every man before he is punished for a breach of it. But admitting that the mode contended for by the appellant, has all the advantages which he represents, the interpretation now given, enables the citizen to enjoy the benefit of it; and, with this additional security, that he is not even bound by this publication until the governor officially promulgates the law. The chances of the citizen knowing it, are therefore much increased; and consequently, the risk diminished of his suffering by enactments to which he is a stranger.

It is to be regretted that the mode of promulgation, contemplated by the law as it now stands, should be open to so many objections. One certain day ought to be given for the seat of government, and

the law be made obligatory through the whole extent of the state within a limited time after the promulgation. At present, the period in which the laws go into effect, is made to depend on the time at which they reach the different parishes, unless promulgation has been made in this city in the manner pointed out by the Code. This is certainly a great inconvenience, and it has been properly pressed on the court that it never could have been the intention of the legislature to adopt so confused and perplexed a mode of giving a certain date to the time when their laws should be in force. But arguments *ab inconvenienti*, cannot authorise us to say, that two or three articles placed in our first Civil Code, and retained on the late revision of it, mean nothing. The remedy for these inconveniences is in the hands of the legislature, who, as soon as their attention is drawn to the evil, will no doubt remove it, and give entire efficacy to the system on which they have heretofore acted.

The judgment of the district court should be, therefore, affirmed with costs.

Watts and *Lobdell*, for the plaintiff.

Grymes, for the defendant.

Lobre *v.* Pointz. V, N. S. 443.

If A B fetch defendant to the counting-house of plaintiff (the latter having previously refused A B a loan) and defendant, on coming there told plaintiff that A B was an honest man; that he might be trusted with safety to whatever amount he might wish, for that he was an honest man, and that he would pay him; and that, if the defendant had the money himself, he would lend it to A B; and plaintiff on this statement accept A B's bill, who speedily becomes insolvent and fails to pay back the amount of this draft, yet is not defendant liable to plaintiff for the loss.

PARISH Court of New Orleans.

PORTER, J., delivered the opinion of the court.

The petitioner states that he accepted a draft of one Bryarly, at the instance and request of the defendant, who asserted that Bryarly was an honest man, and would punctually and faithfully pay any engagement he might contract.

The general issue was pleaded, and the court below, after hearing testimony, gave judgment against the plaintiff, who appealed.

The evidence shows, that Bryarly was in treaty with the plaintiff to purchase some groceries, and that the defendant at the request of Bryarly, asked the plaintiff if he intended to let him (Bryarly) have them, and that he replied he believed he should

It does not appear, whether these groceries were furnished or not; but in relation to the draft which forms the subject of the present suit, it is proved by one of the clerks of the plaintiff, that Bryarly came to the store of the plaintiff, and requested the loan or advance of 500 or 600 dollars, and that he would pay it on his return to the city next fall. This loan was refused; upon which, Bryarly went to look for the defendant, and brought him to the store of the plaintiff. The defendant, on coming there, told the plaintiff that Bryarly was an honest man, that he might be trusted with safety to whatever amount he might wish, for that he was an honest man and that he would pay him, and that if the defendant had the money himself he would lend it to Bryarly.

On this statement, the plaintiff accepted the draft.

It is satisfactorily proved, that Bryarly had, at the time this recommendation was given, the character of an honest man: but it was proved that he was embarrassed in his affairs. Whether this was known to the defendant, is not shown.

The general principles of law on this subject, are perfectly well settled. That mere advice will create no obligation; and that counsel given, unless it be fraudulent, will not render the person giving it, responsible for any consequences that may result from others acting under it, are almost maxims of our jurisprudence. There is frequently, however, difficulty in the application of these principles to particular cases; where, from the terms used, it is hard to distinguish mandate, from advice. We think the case before us is of the latter kind. The language used by the defendant, goes no further than opinion. A strong one, to be sure; but one which cannot make him responsible for the debt contracted, if the intention of the parties was, that the plaintiff should have the benefit of the knowledge the defendant had of Bryarly, and he gave it honestly. Now, if it had been in their contemplation, that the defendant should have become surety for the debt, other language, we must presume, would have been used. The plaintiff would not have been satisfied with an opinion; the principal was able to pay, and would pay; but would have required an engagement, that if the principal did not pay, the surety would. The case before us is almost exactly that put by Pothier. In his contract of mandate, after stating that "if you write to another, to lend a friend a sum of money in your place, it will amount to a mandate;" he adds: "*Mais si je vous avois seulement dit: Vous pourrez preter surement a Pierre la somme qu'il vous demande a emprunter; c'est un honnete homme, qui est tres solvable et qui merite qu'on lui rende service; ces termes ne renferment qu'un conseil d'ou il ne nait aucune obligation.*" *Pothier, Traité du Contrat du Mandat, no.* 21; *Dig.* 50, *tit.* 17, *law* 47.

The case of Amory *v.* Boyd, cited by plaintiff's counsel, requires some notice from the court. There, the person to whom the money was advanced, was wholly unknown to the plaintiff, and he was introduced by a letter from the defendant in the following words: "Captain M. Leary, being unacquainted at New Orleans, will be indebted to your politeness in affording him such assistance as his present situation may require; and a bill on his father for the funds he may need for his present necessities will be honored forthwith." The court thought these expressions amounted to more than a mere recommendation, and advice, and the plaintiff recovered. A comparison of the language used there with that of this case, shows the former of a more positive kind. No opinion is expressed in it. It is direct, and unqualified. To say the least, it was ambiguous, and the party to whom the letter was directed, had no choice but to advance the money or suffer the person who was recommended to him to be without the means of subsistence. Here, if any engagement on the part of the defendant was contemplated, it is impossible to believe the plaintiff would have remained satisfied with an opinion of the responsibility of the person to whom the money was advanced. But that case carried the doctrine of responsibility as far as we are prepared to go, or as the law will warrant. The case before us is several shades weaker, and cannot be governed by it. It falls clearly within the principle *consilii non fraudulenti, nulla obligatio.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Waggaman, for the plaintiff.

Grymes, for the defendant.

Bedford *et al. v.* Jacobs. V, N. S. 448.

When the case is tried by a jury, the court cannot give interest on the sum found by the verdict.

FIRST District.

MARTIN, J., delivered the opinion of the court.

This case was before us in June last, and was remanded, with directions to the district court to act on a motion for a new trial. The new trial was refused, and judgment was entered on the verdict. The defendant appealed. 4 *N. S.* 528.

[Bedford *et al.* v. Jacobs.]

His counsel in this court, assigns as error, that the court gave judgment for the sum found by the jury, adding interest from the judicial demand till payment. He contends that a verdict cannot be altered by the court, and the judgment must follow it.

It is argued by the counsel of the plaintiffs and appellees, that their demand being for the price of goods, groceries and merchandise sold, and the verdict being for the exact sum claimed, it is evident no interest was added, and the court acted correctly in allowing what the law gives; and if we be of opinion that the court erred, the case must be remanded for a new trial, that the plaintiffs may obtain their due from another jury.

The old Civil Code, under which the transaction took place on which the suit is grounded, provides, that in the contract of sale, the price bears interest if the parties have agreed it should; if the thing sold produce profits or other income; and, lastly, if the vendee has been sued for payment. Civil Code, 360, art. 84. But the defendant's counsel is correct in his two positions—the court cannot alter a verdict, and the judgment must follow it.

We ought not to remand the case. If the plaintiffs were dissatisfied with the verdict, they ought to have prayed below, that it might be set aside. On the contrary, they resisted the defendant's attempt in this appeal. As it stands, nothing can be added to it, and the judgment must follow it.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiffs recover the sum of seven thousand nine hundred and twenty-two dollars and sixty cents, with costs in the district court; but it is ordered that they pay them in this.

M'Caleb, for the plaintiffs.

Whittelsey, for the defendant.

M'Clintock *et al. v.* Cairnes *et al.* V, N. S. 450.

PARISH Court of New Orleans.

This case was very elaborately argued at the bar, and gravely deliberated by the court. It turned on the construction of a section of the act of 1817, amendatory of the several acts to organise the courts of the state, &c. which section gave authority to any court of competent jurisdiction to issue attachments to secure and enforce the

payment of debts not actually due, whenever the said court shall be satisfied by the oath of the creditor, &c., &c. of the existence of the debt, and that the debtor is about permanently to depart from this state, or intends to remove his property out of the same: *Provided* always, that the defendant may be released from such attachment, by proving to the satisfaction of the court, &c., that the facts, &c., were not truly stated, or by giving bond and security, &c., &c. This court now *decide*, that this remedy for the collection of debts not yet due, applied only to debtors residing within this state, and who were about to remove themselves, or send away their property. But, inasmuch as the legislature saw fit to interpose and settle this matter in a contrary sense, it is only deemed expedient by the editor, at this place, to cite the provision referred to: it is, section 7, of the act of April 7, 1826, amendatory of the articles 242, 243, 244 of the Code of Practice. It permits an attachment, under certain regulations, in all cases where the debt or obligation is not yet due. The oath, if of the agent, may be to the best of his knowledge and belief.

Lockett, for the plaintiff.

M'Caleb, for the defendant.

Commandeur *v.* Russell. V, N. S. 456.

The action, by a workman, for the price of a boat, cannot be defeated by showing that there is a suit pending against him for damages in another state.

If, after the work is commenced, the contract for which was reduced to writing, a subsequent agreement is entered into by parol, it may be proved by oral testimony.

Depositions in another state, taken under a rule of court of this, must pursue the rules prescribed by our law.

If the cause be submitted to a jury, and they do not find interest, the court cannot add it.

PARISH Court of New Orleans.

MARTIN, J., delivered the opinion of the court.

The defendant, sued for the balance of the price of a steamboat built by the plaintiff, pleaded that the contract he was sued on was written, and contained conditions precedent, which the plaintiff had not complied with; that there was a suit pending in Kentucky for the same cause of action; that the boat was not completed in due time, and she is not constructed according to the contract.

[Commandeur v. Russell.]

The plaintiff had a verdict, for which judgment was given with interest from the judicial demand, and ordered the sale of the boat for the plaintiff's payment: the defendant appealed.

His counsel took three bills of exceptions to which our attention is called. The first was to the opinion of the court overruling the dilatory pleas.

The second was to the reading of the depositions of several witnesses, on the ground that they went to show a parol agreement for alterations and deviations from the written contract—particularly as these alterations and deviations were not stated in the petition.

The third was to the refusal of the court to permit the defendant's counsel to read certain depositions, on the ground that they were not taken in the manner prescribed by the Code of Practice.

I. On the first bill the counsel relies on the 171, 172, 173, 343 and 344th articles of the Code of Practice and 1 Selwyn, *N. P.* 529.

The first plea overruled, is that which sets forth that the agreement sued upon, contained many matters and conditions precedent, to be complied with by the plaintiff, which are not alleged to have been complied with; and so far as it concerns such conditions or others to be performed, it is not denied, but expressly admitted they were not complied with.

This plea was, in our opinion, correctly overruled; the petition clearly states that, in conformity with the stipulations of the agreement, (which is annexed to the petition,) and without any default but that caused by the defendant, who neglected timely to furnish certain materials necessary to the construction of the boat, and which it was his duty to have furnished; he the plaintiff, completed the boat, and the defendant, without the plaintiff's consent, fraudulently removed her from the plaintiff's yard, and he neglects and refuses to pay, &c. We think the cause of action is stated with sufficient certainty.

The pendency of a suit in the state of Kentucky for damages demanded from the present plaintiff, by the same defendant, on the agreement on which the present suit is brought, can certainly be no bar to the present action. If it were, the builder of a boat could, for a very long time indeed, and perhaps for ever, be prevented from suing for the price of his labor, by actions brought and dismissed in convenient time on an alleged claim for damages.

II. The petition alleges that, while the boat was building, the defendant requested that her dimensions might be extended, and this was done accordingly. The charges which this alteration gave the builder a claim for, constitute a proper item in his demand; and as no contract as to this intervened, the new bargain must be proved by parol. The prohibition of parol evidence, on which the defendant relies, extends only to cases in which a party seeks to show by witnesses that the contract was not originally such as the writing shows, not that a new contract has intervened. Certainly this new contract destroys the first. But it is the daily practice to admit parol proof of the payment of a note, and thus to destroy by parol proof the whole

effect of a written contract: if the proof of the dissolution of such a contract is admissible, it is difficult to say on what ground the like proof of its modification should be rejected.

The last bill is to the refusal of the court to allow the reading of certain depositions taken in Kentucky, on the ground they were not taken in the mode prescribed by our Code of Practice. To support his objection, the defendant relies on the constitution of the United States and the act of congress, for the authentication of records of other states; on the cases of Bernard *et al. v.* Vignaud, 10 *Martin* 637; and Bowman *v.* Flowers, 2 *N. S.* 270.

When a deposition is taken in another state to be used in the courts of this, the proceedings are those of that court, and the provisions of our own must regulate them; and in doing so, they do not impugn either the constitution of the United States or that part of it which regulates the force and effect of records of other states, or the act of congress which prescribes the mode of their authentication.

On the merits, the correctness of the verdict of the jury is attacked in this court. We have examined the evidence, and do not believe it our duty to remand the case.

The judgment is complained of on two grounds:

1. Because it decrees the sale of the boat for the payment of the plaintiff.

2. Because it superadds interest to the sum awarded by the jury.

I. It is true the action is *in personam*, not *in rem*. But the sale of the boat was prayed for, and the plaintiff had expressly stipulated for it in the agreement on which this suit was brought; the plaintiff therefore cannot object to it.

II. The plaintiff contends that interest is due, according to the new Code, art. 1932, from the judicial demand, on the amount of the judgment; and that in this case the defendant cannot resist the allowance of it, on account of the claim being unliquidated, because, by his own wrong he prevented the liquidation of it by the measurement of the boat; as he forcibly and surreptitiously took her away, and thus prevented the measurement.

To this the defendant's counsel reply, that the new Code speaks only of defaults in contracts for the payment of money: "In contracts which do not stipulate for the payment of interest," and has no reference to such a debt as is alleged to be due here, and it is controlled by the Code of Practice, which is posterior, that in all suits on unliquidated debts, if there be judgment for the plaintiff, there is wrong; and if the Code of Practice is not applicable to these, it is to none; that even if a measurement had taken place, still the debt would be unliquidated: the moment the written contract was destroyed, the debt that was to become due, was at once uncertain and unliquidated.

It is not for us to inquire whether interest be due; but whether it was adjudged by the proper tribunal, we think the jury, not the court, were to act on the claim for interest, and the court erred in superadding it to the sum found by the verdict.

It is, therefore, adjudged, allowed and decreed, that the judgment of the parish court be annulled, avoided and reversed; and that the plaintiff recover from the defendant, the sum of four thousand two hundred and twenty dollars and sixty-one cents, with costs, in the parish court, but that he pay them in this.

Preston, for the plaintiff.

Watts, *M'Caleb* and *Byrnes* for the defendant.

Shimmin *v.* Jones. V, N. S. 463.

FIRST District.

Remanded from 3 *N. S.*—This was a case which turned on a question of fraud. There were four successive verdicts, finding fraud in defendant.

He made no objection to the introduction of evidence; and although that before the jury might have supported a verdict in his favor, it is not strong enough to authorise us to come to a conclusion in direct opposition to so many verdicts; neither do we think it right to send back a case that has been already remanded, and which would probably return with a like verdict—especially, as no new trial was asked below, and the inferior judge has in the judgment expressed his satisfaction with the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Morse, for the plaintiff.

Lockett, for the defendant.

Cucullu *v.* Louisiana Insurance Company.
V, N. S. 464.

The sentence of a foreign court of admiralty is conclusive on the matters on which it decides.

But in an action between the insurer and insured, the court may examine whether the tribunal which condemned was rightfully constituted by the law of nations.

But the regularity of its proceedings cannot be inquired into.

Whether, on a change from one form of government to another, the authorities and laws of the previous one exist until the new government goes into operation.—*Quære.*

Under the clause in a policy, warranted free from loss which may arise from engaging or being engaged in illicit trade, the insurers are not responsible for the risks until the goods are landed.

The authority of a nation cannot extend beyond her own limits, but she may guard against injury approaching them from without.

Any regulation extending the powers of a belligerent nation beyond those conferred *jure belli*, can only have effect within her own limits and a breach of them must be considered a violation of municipal regulations.

A condemnation *jure belli*, and for a breach of municipal regulations will falsify the warranty by which the insurer was protected against loss from illicit trade.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action is brought on four policies of insurance, executed by the defendants on goods on board the schooner Felix, from the port of New Orleans to Soto la Marina, in the republic of Mexico. The petition sets out the usual averments of loss, abandonment, &c., and prays judgment for the amount insured, viz: 30,300 dollars.

The defendants pleaded the general issue. There was judgment in their favor in the court of the first instance, and the plaintiff appealed.

The principal ground of defence, set up to the claim of the petitioners, is derived from a clause contained in the policy of insurance, by which the insured warrant the assurers "free from any charge, damage or loss, which may arise in consequence of engaging, or having been engaged, in illicit trade at any time whatsoever."

To prove that the loss of the goods insured had arisen from one of the causes mentioned in the warranty, the defendants produced and read in evidence a decree of condemnation, pronounced by a court of justice in the republic of Mexico.

On the trial, the plaintiff offered evidence to contradict the facts on which this sentence of condemnation was pronounced. The defen-

dants contended, that the decree of the court was conclusive, in relation to all the matters on which it acted; and objected to the introduction of any proof in opposition to it. Of this opinion was the court, and excluded the testimony: the plaintiff excepted.

The question which the bill of exceptions presents, with every other in the cause, have been most elaborately argued. The appellant has contended on this part of the case, First: That the sentences of courts of admiralty of foreign nations, are not conclusive evidence in an action between the insurer and insured. And, Secondly: That admitting the rule to be that they are conclusive, the sentence of the court which was offered in evidence was not, because the tribunal had not competent authority to act in the matter on which it pronounced judgment.

The first point revives a question which has been as much agitated and discussed as any which has been presented to the tribunals of the United States. The weight of authority is so decidedly in favor of the conclusiveness of sentences of foreign courts of admiralty, in suits between parties standing in the relation of those now before the court, that we did not expect to see the subject stirred again. It is true this doctrine has always had its opponents, and able ones; but the steadiness with which the supreme tribunal of several states in the Union, and that of the United States, have maintained it, notwithstanding the opposition, gives to their opinions a weight to which, in ordinary circumstances, they would not be entitled.* In the year 1816, the question came before this court, and the judges then presiding in it, declared in conformity with the doctrine generally received throughout the Union, that the judgment of a foreign court of admiralty was conclusive between the insurer and insured.† This opinion has been ably, but on the best view we can take of the subject, unsuccessfully impugned, by the argument at the bar. The laws of Spain being so far as it could be learned at the time of that decision, or as it

* The learned and venerable Duponceau, (whom the civilians of France and Louisiana hail as a *confrère*) is among the ablest of these opponents. He traces the actual birth of this doctrine, in England, to a *dictum* of the Bench, not burthened with a feather's weight of reason or reasoning, in the case of Hughes v. Cornelius, 2 Shower's Reports, 232, time of Charles II, save that it is "according to the *jus gentium*." But this was a clear misapprehension in the Court of King's Bench; of this no better proof is required than the citations of Roccus, Straccha, Scaccia, Emerigon and Valin, made by Mr. Duponceau, (*Jurisdiction*, p. 15,) in all which the corruption, servility to power, fraud, or ignorance of foreign tribunals, are held not to be any cover to the assurers against the scrutiny of the truth, at home. Of this opinion were Lords Ellenborough and Thurlow. *Malim errare.*—The only barrier at present to the overthrow of this principle is the authority of British practice, not any venerable rule of the law of nations. The rule once announced *ex cathedrâ* in England, fell immediately into that class of artificial principles peculiar to the English mind, to which "the courts of justice adhere with the *dignity belonging to regular and permanent establishments.*" Abbott on Shipping, 263.

† See Blanque v. Peytavin *et al.*, 4 *Martin*, 458.

has been shown now, silent on this matter, the court felt itself at liberty to adopt the doctrine which is considered most conformable to the other commercial usages and customs prevailing in the state; and in acting on the subject, with the choice of conflicting opinions in other nations, it adopted that which assimilated us to the rules prevailing in the greater number of our sister states. It was not ignorant that a different effect was given to these sentences in some of the continental states of Europe, but that rather proved the law of nations was unsettled on this point, than that the rule the court gave the preference to, was not the true one. It might be as well said in Italy or France, that their jurists and courts were wrong, because the United States and England held a different opinion, as it is to argue here that we are in error, because in France and Italy they think differently from us. In questions of this kind we prefer the exposition of national law which may come from our own tribunals, to that of any foreign court or jurist, unless on an examination of the principles it rested on, we were perfectly convinced the foundation was unsound. There is another reason which has no inconsiderable weight with us. The more closely our rules, on questions of commerce, approach those of our sister states, the more facility do we extend to that intercourse and trade, on which the prosperity of this state most materially depends; and this consideration can never be lost sight of by the court, where the legislature leaves us without positive law.

We deem it unnecessary, for it would be unprofitable, to go at length into an examination of the different arguments used at the bar, and show why they failed to produce that conviction on us they were intended to impress. Had they even made us greatly doubt, they would not have induced us to retrace our steps, and decide this case on a change of opinion. It is now ten years since that decision has been made. It has been known to the community, and the parties to this suit must be presumed to have contracted in relation to the law as expounded by the court of the last resort in the state. Under such circumstances, nothing short of the clearest conviction on our part that we had been in error, could authorise us to recognise a different rule, and apply it to the case before us.

But it is contended that, however the general rule may be, the sentence of the court offered in evidence was not conclusive, because it was pronounced by a tribunal of incompetent authority.

The first question which meets us on the inquiry into the correctness of this position is, whether this court has the power to examine into the competency of the tribunal by whose sentence the condemnation was pronounced?

We entertain no doubt that we possess such power. The great extent to which we carry our comity for these tribunals, and the influence we accord to their judgments, far from being an argument against this power, renders the exercise of it indispensable to the correct administration of justice. That individuals by taking on themselves the attributes of judicial power, and clothing their acts

of assumed jurisdiction with the forms of proceedings of courts of justice, could rightfully condemn property, and give to their sentences the effect which belong to those of tribunals constituted by sovereign authority, is a proposition that requires no refutation. It is clear the right belongs to every court to examine whether the sentence offered to it, emanates from an authority competent, by the law of nations, to judge of the matters on which it has pronounced. 4 Cranch, 269; 1 Rob. 144; 4 *Ibid.* 35; 5 *Ibid.* 255.

The competency of the tribunal, whose sentence was offered in evidence, has been assailed on two grounds. First: That it was a tribunal established by the government of Mexico, antecedent to the formation of the federal constitution, and that its authority ceased with that event. Secondly: That the laws by which tribunals of marine jurisdiction were created in the country, prescribed a different organisation from that which appeared to belong to the court that condemned the property.

The plaintiff produced no proof in the court below, in support of this ground; but he contends, that the incompetency of the tribunal results from the evidence introduced by the defendants themselves.

That evidence shows that tribunals of admiralty were established prior to the constitution:—That, by that instrument, circuit courts were directed to be established, in which the jurisdiction of all prizes by sea and land, (*presas de mar y tierra*) and the cognisance of all pursuits in relation to contraband goods, should be vested.

Whether, on a voluntary change by a people, from one form of government to another, the laws in force at the time of such change cease to have any effect, and the authorities by whom they are administered, lose the power vested in them by the previous government, before the succeeding one is organised and goes into effect, are questions by no means free from difficulty. The very general use of a positive provision on that subject in the different constitutions which have been formed since the independence of these states, is certainly a strong argument to show, that in the opinion of the framers of these instruments, such a provision was necessary, and that without it, a complete interregnum would be created, during which there would be neither laws, nor officers to administer them.—This argument is, however, by no means conclusive, and there are many who hold a contrary doctrine. It is true that a majority of the members who now compose this tribunal, so decided in a case that came before it in the year 1821, and such, also, was the opinion of the late superior court of the territory of Orleans. But a majority of the persons who have at different times filled this court, since its organisation, seem rather to have thought, that the constitution did not supersede the former government, until put into operation by the legislature; and one of the judges declared, that without a schedule, this would have been the consequence. That the most radical change in form, does not destroy the old government until the means are furnished of giving full effect to the new. Bermudez *v.* Ibanes, 3 *Martin*, 2;

Dufau *v.* Massicot, 3 *Ibid.* 289; Bouthemy *v.* Dreux, 10 *Ibid.* 1; 2 *Martin*, 278.

Two of the judges in this court retain the opinion they expressed in the case of Bouthemy *v.* Dreux, in relation to our own constitution; but we unanimously think, that the question is by no means so clear and free from doubt, as to authorise us to declare, that the government and courts of another country, who came to a different conclusion in relation to the effect produced by a change from one form of government to another, did what they had no right to do; and that all their acts are null and void. They were the proper judges to construe their own constitution and laws, and their decision must be adopted as the true construction by other countries. The correctness of this principle is established by an irresistible course of reasoning in the case of Elmendorf *v.* Taylor, decided in the Supreme Court of the United States. The chief justice, in delivering the opinion of that tribunal, observes: "No court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain or France, or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding." 10 Wheaton, 160.

That a construction has been given to the constitution of Mexico, adverse to the position of the plaintiff, is proved to our entire satisfaction. The acts of the court in continuing to administer justice after the adoption of the constitution, and before the organisation of the circuit courts, is conclusive evidence of their opinion respecting their jurisdiction. In addition to this, the testimony of lawyers in the city of Mexico, has been taken. One of them, a distinguished member of the profession, and holding a high situation in the government, after examining the proceedings, swears, that the court which condemned the goods was a lawful tribunal, and that its proceedings were regular, and its jurisdiction undoubted, as the circuit courts had not, at the time the sentence was rendered, been established under the constitution. Such being the construction in Mexico, it must be the construction here, where the proceedings come collaterally before us.

The second point on which the competency of the tribunal is attacked, is derived from the terms of the law creating it. By this law, a Spanish ordinance contained in the 4th, 5th, 6th and 8th laws of the 8th title of the 6th book of the *Novisima Recopilacion*, is prescribed as the rule to be followed in the organisation of the tribunal, and its practice; except where it is in opposition to the laws of Mexico.

This ordinance has been minutely observed on by the counsel, and a close comparison of it, with the actual organisation of the court, as set forth in the proceedings, does certainly show a considerable variance between them. But we are as unprepared on this ground as the other to declare the court incompetent; for we have only part of the laws before us. That which establishes the tribunal declares,

that the ordinance is to be followed, except where the laws of Mexico differ from it. When the organisation of the tribunal is shown to be different from that ordinance, we can come to no other conclusion, than that the difference is produced by laws to which we have not access. Even if other laws besides the constitution were before us, it would be difficult for us to say, that the tribunal was not rightfully and legally constituted. It is a conclusion to which no court can come, in regard to the organisation of a tribunal in another country, without much hesitation, and without feeling that it is peculiarly liable to err. To form a safe judgment, it must have all the laws of the country before it, and it must be satisfied, that it is so well acquainted with the jurisprudence of that country, that the same construction is given to the laws, as they receive in the place where they are made. Both of which, it is difficult for a foreign tribunal to be sure of. Our ideas on this head may be illustrated, by supposing a Spanish tribunal to inquire into the constitution of the Court of King's Bench in England, and its powers, in order to see how it got jurisdiction in civil matters, and how far that jurisdiction extended.

But in this case, we are not left to these considerations. It has been proved by the evidence of lawyers residing in the city of Mexico, that the tribunal was competent, and its proceedings regular. The testimony was much commented on, but nothing we have heard in argument, has destroyed, or shaken its credit. It appears to have come from persons of respectability. It was taken by deposition, and these depositions were opened, as the endorsement on them shows, some time before the tribunal. If the plaintiff believed they were improperly obtained, or that the witnesses erred through ignorance, or from corrupt motives, it could not have been difficult to disprove them. In every point of view, then, we are satisfied, that there has not been enough shown, to authorise this tribunal to declare that the court which condemned the goods was incompetent.

The same observations apply to the objection that this was a prize, and not an instance court. The proof establishes, the tribunal had authority to pronounce the judgment set forth in the proceedings. What is the nature and extent of that judgment, has been much controverted, and will be the subject of examination hereafter.

A great deal was said in relation to the irregularity of the proceedings. The want of a proper law officer, to advise the assistance of an auditor, and not an assessor, the necessity of two sentences according to the laws of Spain, &c. Some of these objections might, perhaps, be well founded, if we were an appellate tribunal to review the sentences of the Mexican courts of admiralty. But we have no such power, and consequently cannot look into these errors. They were matters for the consideration of the judges who pronounced the sentence, and their decision on them is final. 4 Cranch, 278.

The plaintiff, however, further contends, that admitting the sentence to be conclusive as to every thing on which it acts, still he must recover on the following grounds:

[Cucullu v. Louisiana Insurance Company.]

1. The seizure was made on the high seas, not in the port of Soto la Marina.

2. The whole of the goods seized, were condemned *jure belli*, or if not the whole, a part were.

I. The declaration of the captain, officers and crew of the schooner taken before the cousul of the United States at Alvarado, states, that they sailed from New Orleans, and anchored in Soto la Marina Roads, on the 7th September, and that on the same day a boat came on board from the Mexican vessel Tampico, and took forcible possession of her. In the examination of the captain taken before the court, he renews the declaration that he was at anchor when he was seized, but states that it was in the port of Soto la Marina, and adds that at the time of the seizure, passengers who came in the ship had been landed.

It is admitted in the argument, that the place where the schooner was seized, is some distance from that where vessels usually anchor when they discharge their cargoes at that port. That it was about four leagues from the shore—and that the coast is low and flat.

Whether this was a seizure on the high seas or not, is immaterial in the view which the court has taken of the rights of the parties. Before stating those views, a position assumed by the plaintiff must be examined. It is contended by him that, from the terms of the policy, the defendants took all risks until the goods were landed.

The terms of the policy certainly are, that the insurer is to be responsible until the goods are landed. But the designation of time during which the responsibility should last, can only extend to the risks for which the insurer became responsible, not to those excluded by the warranty. They are exceptions introduced to the general terms of the contract, and their force and meaning must be determined by a consideration of the extent to which this exception goes; not by the general words of the policy, the effect of which it was the object of the warranty to guard against.—Whether the seizure was made in such a place as it might be rightfully made, for illicit trade, is the true question—not whether the goods were landed. According to the construction of the plaintiff, the warranty in the policy was of no use to the insurers. For if they were responsible for all risks of seizure for illicit trade, until the goods were landed, notwithstanding the warranty, then the insertion of the exception did not alter their situation, as without such a clause their responsibilities would have ceased with the landing of the goods.

A law of Spain was much relied on to prove that the jurisdiction exercised in this case was beyond the territorial limits of the government of Mexico. The law is found in the ordinance of Corso already quoted. It is entitled "The rules which are to be observed in case of prize." It declares that the immunity of the coast, shall not, as heretofore, be marked by the doubtful and uncertain distance of a cannon shot, but by the distance of two miles—that all prizes made within that distance shall be judged of by the commandant of that port into

which the prize is brought; and that, if made beyond it, they shall be taken cognisance of by the tribunal of the captor. *Novisima Recop. liv.* 6, *tit.* 8, *law* 5.

That this ordinance marks the extent of territorial jurisdiction of the sovereign of Spain, and that the seizure here made was beyond these limits, can not be questioned. But with these admissions, the question still remains, whether the seizure was not made in the exercise of a right, which every nation enjoys, to prevent its laws being evaded. If it was, it is immaterial in our view of the subject whether it was made within the limits, or not.

Strictly speaking, the authority of a nation can not extend beyond her own territory. By the common consent of nations this authority has been enlarged, where the sea is the boundary, to the distance of a cannon shot, from the shore. Within these limits foreigners are protected, and prizes cannot rightfully be made of their vessels by enemies. But the right of the nation to protect itself from injury, by preventing its laws from being evaded, is not restrained to this boundary. It may watch its coast, and seize ships that are approaching it with an intention to violate its laws. It is not obliged to wait until the offence is consummated before it can act. It may guard against injury, as well as punish it. If, indeed, in the exercise of this right an unreasonable range was taken, other nations might object. But so long as it is confined to the seizure of vessels entering the port for which they are destined, it will not, it is presumed, form a just ground of complaint. Our own legislation authorises revenue cutters to visit vessels four leagues from the coast; and the acts of congress on this subject, are a clear expression of the opinion of our government, that nothing in the law of nations prohibited them to confer such power on its cruisers. The case of Church *v.* Hubbard, decided in the Supreme Court of the United States, is almost that before the court. It was there held that the insurer under warranty, such as that inserted in this policy, was not responsible for a seizure made four or five leagues from the coast—although it was admitted the territorial jurisdiction did not extend further than a cannon shot from the shore. The cases cited by the appellant, from Taunton's Reports, were decided on a different form of policy.—The warranty there was "free from capture and seizure in the port, or ports of discharge." By these expressions the parties excluded a particular place from the risks assumed by the insurer under the policy. By the warranty here, the insured took upon himself the risk of seizure for illicit trade at any distance from shore, where, by the law of nations, such seizure could be rightfully made, 2 Cranch, 186; 2 Taunton, 499; 4 *Ibid.* 387; 9 Wheaton 371, 11 Mass. 104.

II. The second ground assumed by the plaintiff on this part of the case will be best understood by dividing it. We will first consider the proposition that the whole of the goods were condemned in the exercise of a belligerent right.

The distinction, between the rights which a nation acquires in con-

sequence of her being at war with another, and those which she possesses as sovereign within her own limits, seems to us so clear that there can be little doubt in relation to it. The law of nations having defined the extent of belligerent rights; any law of a particular country which goes beyond these rights, must necessarily derive its authority from the nation within his own limits, and a punishment for a breach of this law, must be referred to a violation of municipal regulations, for it is only as such, that it had any force; or that punishment could take place under it.

In regard to the particular regulation under which this property was condemned, it is beyond doubt that it was a municipal one, and that it derived its authority from the power which the nation had within her own territory, not from her rights as being at war with another country. The decree of the Mexican government, prohibits the admission into their ports, not only of goods and merchandise, the production and manufactures of Spain, but also of all merchandise which may have been brought from the ports of that country, no matter what its origin, or to whom it may belong. Or, in other words, they condemn even neutral property, of neutral origin, if it comes from Spain or her dependencies. This was a right which the law of war did not confer, consequently a condemnation under it cannot be considered one, *jure belli*.

It was urged, that the motives avowed by the government in passing the decree, show plainly that it was intended to distress the enemy, and that as the measure arose out of a state of war, a condemnation for a breach of the law must be referred to the same source. Admitting this to be their motive, and we believe it such, the consequence contended for, does not follow. Sovereigns may make what regulations they please within their own territories, and no matter what may be the motives, the source from which the regulation derives its force, must be the test by which the law is to be designated, not the motives that induced its passage.

The cause of Foix *v.* Phœnix Insurance Company, decided in the Supreme Court of Pennsylvania, was much relied on by the plaintiff. It arose out of a sentence of condemnation pronounced under the Milan and Berlin decrees, and the assurer contended he was not responsible, as by the policy he was warranted free from illicit, or prohibited trade. The court decided that a condemnation under that decree, though the vessel was seized in entering the port, was not a condemnation for illicit or prohibited trade, but a condemnation *jure belli*, and that the insured could recover.

A great deal of the argument of the counsel, and the reasoning of the judges, were directed to show, that the Berlin and Milan decrees were a violation of the law of nations, and, to a certain extent, there is no doubt they were. Undoubtedly, France had no right to say, neutral nations should not trade in the manufactures of her enemy, and that if they did, their property would be captured on the high seas. But we agree with the counsel for the defendants, that parts

of these decrees were not contrary to that law. A belligerent has the right to say, he will not permit merchandise from an enemy's country to be imported into his. He can, not only exercise this power in time of war; he may do it in a period of profound peace. Examples of the latter kind are very numerous, and the authority to do so is unquestionable. To refuse it, would be tantamount to a declaration that the nation who passes such a declaration is not independent. For if she be, who can question her right to regulate her internal concerns as she pleases.

The judges who decided this case, felt the weight of this principle. They admitted the right to pass such a law as has been just spoken of, and the right to enforce it, at an indefinite distance from the shore: but they decided against the assurer, because the seizure and condemnation had not been made on the ground, that the insured was about to import prohibited goods, but that they were British manufactures. 5 Sergeant & Rawle.

Being thus satisfied, that a condemnation under these decrees of the Mexican government, will falsify the warranty, we proceed to examine whether in point of fact, any or all the goods insured were so condemned.

There were two sentences pronounced by the court. The first, after reciting that the cargo is composed of 295 barrels of wine, 123 boxes of wax, or hardware, and other effects, proceeds to detail the proofs, by which it appears that the wine and wax came from the port of Havana; and concludes as follows: "that we ought to declare, and do in fact declare, as good prize, not only the before mentioned American schooner, the Felix, but also the wine and wax referred to in the proceedings, with the marks there given. That this condemnation should also extend to the other 45 boxes of wax which are found on board the said schooner, and all the other productions, merchandise, and effects which shall be proved to be of Spanish origin, proceeding from any port of that nation, or of those prohibited, &c., &c."

The second decree was preceded, according to the practice of the Spanish tribunals, by a report of the auditor, or assessor, who states that the former decree respecting the schooner Felix, should be confirmed, with the exception of a billiard table, a still, ten hampers of empty bottles, and a box of books; they not being contraband, nor proved to be brought from the port of Havana in the said schooner, nor Spanish property, nor the production or manufactures of the enemy; in which qualities and prohibitions (*cuyas calidades y prohibiciones*) are comprehended the other effects which are condemned as good prize, according to our revenue laws and the declaration of war against Spain and her dependencies.

After stating some of the proceedings which had already taken place in the tribunal, the assessor adds: "From which proceedings result most clearly, the legal causes of seizure, viz: the national quali-

ties of some articles, and the sailing of a vessel from a port which was under the domination of Spain."

The junta, or court, on this report gave a final sentence; in which, after reciting the previous proceedings, they declare, that "having read and taken into consideration the antecedent opinion of the assessor, and discussed all the points, with which we unanimously agree, conformably to what is there exposed, confirming, as we do confirm, the condemnation of the schooner Felix and her cargo, as good prize, excepting from said penalty ten hampers of empty bottles, a still, a billiard table, and a box containing five bibles and four new testaments."

It has been contended, that these sentences do not embrace the whole of the cargo; that only a part of it is condemned.

But on this branch of the subject, the court has no doubt. The original sentence condemns the wine, and wax, and such other articles as might be found liable to condemnation. The report of the assessor confirms this sentence, except in relation to a still a billiard table, some empty bottles, &c. If it had been the opinion of the assessors that nothing more had been condemned than the wine and the wax, and that nothing more should be, the exceptions were unnecessary; for a confirmation of the original sentence, supposing it limited to the wine and the wax, would not have embraced them. The final sentence, however, places this matter beyond argument. It condemns the schooner and her cargo, with the exception of certain articles there mentioned. Consequently, every article, of which the cargo was made up, and which is not excluded by the exceptions, is condemned.

The report of the assessor already referred to, which is adopted by the court as the basis of its last decision, after stating that certain goods were acquitted because they were neither articles of contraband, nor proved to be brought from the port of Havana, nor Spanish property, nor the productions or manufactures of Spain, proceeds to state, that in these qualities and prohibitions, are comprehended the other effects condemned. It was argued, that as the wax and the wine were condemned in the first sentence, for a breach of municipal law, and as new ground, that of being enemy's property, is inserted in the second, as a cause of condemnation, that the fair construction to be given to these decrees is, that all the goods embraced by the last judgment, which were not included in the first, must be considered as seized and forfeited for the additional reason given in the sentence; and that, for this portion of goods the insurers are responsible, as the warranty does not exclude war risks.

But the second sentence is in the conjunctive. It condemns the whole, for *all* the causes therein mentioned. Consequently, it condemns them for *each* of these causes, and one of them is a breach of municipal law.—If there were any inconsistency in the two decrees; or if the different reasons assigned in the last one, could not be reconciled with each other, then, perhaps, it would be true to say, that the

several causes of condemnation must be referred to the different portions of which the cargo was made up. But there is no such contradiction; they may well stand together. The goods might be enemy's property, and also come from the Havana. It is not impossible, that between the first and second sentence, proof was obtained, which brought the whole cargo within the reason given in the last decree. We at least are bound to presume so; for so the sentence has said, and we cannot contest its verity. But, admitting this proof was not obtained, and that the wine and wax must be considered as condemned for the causes mentioned in the first decree, and no other; that does not weaken the position, that the rest of the goods were not only enemy's property, but brought from an enemy's port.—The decree condemns all the cargo, for all the reasons for which it could be condemned; proving that part of it came within one of these reasons, does not establish, that the remainder was condemned for a single cause, when the words of the sentence say, they are within all.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Mazureau and *Strawbridge*, for the plaintiff.

Eustis and *Slidell*, for the defendant.

Cucullu *v.* Orleans Insurance Company.
V, N. S. 492.

FIRST District.

A precisely similar case.

Duncan's Executors *v.* Poydras's Executors.
V, N. S. 492.

The shipper of goods is not responsible for the cost of defending the ship and other property on board, which is seized and prosecuted for illegal trade.

FOURTH District.

PORTER, J., delivered the opinion of the court.

This action was commenced in the lifetime of both the parties, in the district court. On the death of the defendant it was transferred to that of probates; where judgment being rendered in favor of the plaintiff, an appeal was taken to the district court. That court confirmed the judgment of that of the first instance; and the defendants have again appealed to this.

The whole claim of the petitioner grows out of a seizure made by the collector of the port of Orleans, of a quantity of slaves shipped from one of the northern states to this, on an allegation, that the regulations contained in the act of Congress, in relation to the transportation of slaves from one state to another, by sea, had been violated.

Three libels, it appears, were filed against the vessel, in the district court of the United States; and two actions were brought in the court of the state, against the collector: one to obtain a sequestration of the slaves, and the other for damages consequent on the illegal seizure.

The services and the value of them are proved in those actions in which Poydras was directly concerned, where he was plaintiff and defendant; but we can see no foundation for the claim to make him pay what is called, in the account, his proportion of the fees due for defending the captain and sloop. A man who ships goods on board a vessel which is illegally seized, suffers enough in the detention attending his own property, and the expense he may incur in getting it released, without being obliged to defend the ship and master for a misfortune by which all suffered.

The plea of prescription is not supported. Some of the suits were continued up to the year 1821; and between that time and the commencement of the action, the period required by law to bar claims of this description had not elapsed. When the services are continuous and uninterrupted, prescription runs from the time they are finished, not from their commencement.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is fur-

ther ordered, adjudged and decreed, that the plaintiff do recover of the defendants, the sum of fifteen hundred dollars, with costs in the court below, the appellee paying those of appeal.

Conrad, for the plaintiff.

Seghers, for the defendants.

Thatcher *v.* Walden. V, N. S. 495.

A verbal power of attorney if given in a state where slaves pass by parol, is legal proof of the authority under which a written sale was made in this state.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action to recover a slave in possession of the defendant, which the plaintiff alleges to be his property. The cause was submitted to a jury, who found for the defendant: and the plaintiff appealed.

Two of the questions presented for discussion, arise out of a bill of exceptions taken on the trial.

The defendant offered one Crawford as a witness, to prove that the plaintiff had given a verbal power to the person under whose sale the defendant holds the slave, to sell him. He was objected to on two grounds: First, that he was interested; and Secondly, that parol proof could not be given of such a power; that it must be in writing.

It appears the witness was part owner and captain of the steamboat Steubenville, on board of which the negro was hired. The sale took place in New Orleans, to relieve the boat from some embarrassments she was under. Two of the brothers of the plaintiff were also owners of the boat, and one of them was on board at the time of the sale. It is alleged by one party that the sale was made by this brother, under a power of attorney from the petitioner: by the other, that the sale was made by Samuel Thatcher, without authority; and that the witness had promised to make good the price to the plaintiff. The testimony on this head is contradictory. The jury, by their verdict, seemed to have believed the former was the fact. In either point of view, the witness was competent. In the first most clearly so, as he was not responsible for Thatcher's act. In the

second still more clearly; for if the petitioner recovered, he became liable to him for the price. So that his interest, if any, was favorable to the party objecting.

The power to sell was given by the plaintiff in the state of Alabama; and it is proved that, by the laws of that state, a verbal authority to dispose of a slave is there legal, and binds the owner.

It is a general rule, that contracts must be construed in relation to the laws of the country in which they are made; and that the proof offered of these contracts must be such as those laws require. The last position is a necessary corollary of the first; for if, to the validity of a contract in the country where it is made, certain forms are required, or certain evidence made necessary; to receive less, or require more proof in another country, would either be making a contract binding on the parties which the law of the place where they stipulated did not, or would be virtually impairing the obligation of the contract by refusing to enforce it, unless the party seeking to do so, furnished proof which it was impossible he could give. There is no difference between the right of a stranger to have the aid of the laws of the country where his debtor resides, to compel him to do justice in relation to a contract made under another government, and that of one citizen of a state, to enforce his claim against another. This principle which is founded on the comity of nations, and makes a part of international law, would be a mere illusion if other evidence was required for the validity of the agreement, than that of the laws of the country where it was made. The application of this doctrine to the case before us, will readily show that the court below committed no error in admitting the witness to testify to the authority given to sell the slave. The contract of mandate was complete in Alabama, and binding there on the plaintiff. It consequently bound him wherever the attorney in fact might carry it into execution, as the authority given affixed no limitation as to place. We cannot distinguish between the right to sell, as derived from a verbal power, and that acquired by a purchase made by parol; and it has never been doubted, that in the latter case such evidence was good, where the slave was bought in a country when writing was not necessary to give validity to the contract. *Toullier, vol.* 9, *cap.* 6, *sect.* 2, *no.* 44 in note; *Repertoire de Juris, vol.* 9. *verbo Preuve, sect.* 2, 3. *art.* 1. *no.* 3; Kames on Equity, 565, 7 Term, 241.

The objection in respect to the agent having sold for less than the price directed to be obtained by the principal, is removed by the offer made by the former to make up the deficiency. *Potheir, Contrat du Mandat, No.* 94.

On the merits, we see nothing which would authorise us to set aside the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

M'Caleb and *Byrnes*, for the plaintiff.

Hoffman, for the defendant.

Carraby *et al. v.* Morgan. V, N. S. 499.

FIRST District.

A sheriff who seizes property not subject to execution, is liable to an action for damages.

A party may always have an injunction when the act would give rise to a claim in damages.

He who interpleads, cannot change the nature of the action in which he intervenes.

Akin *et al. v.* Bedford *et al.* V, N. S. 502.

FIRST District.

He who remits a bill, his own property, must abide the consequences. If Titius directs Caius to remit the balance of his account, and this be done by Antonio's bill payable to Caius, *supra protest*, and Antonio fail, by whom will the loss be borne? If Caius, in taking the bill, did not act as Titius' agent, as if he possessed the bill, or acquired it before he received the order—or if, having taken it after the order, it appears he acquired it for himself, as *e. g.* if he remitted it at a different rate of exchange, by which he gained something, the sale of the bill is at his risk; for he is considered as a drawer. *Casa regis*, 62, 63, p. 49, 50.

Elkins *v.* Canfield. V, N. S. 505.

PARISH Court of New Orleans.

If letters of curatorship be granted without legal citation, as demanded by Code of Practice, art. 966, they will be annulled at the suit of any person interested.

EASTERN DISTRICT, APRIL TERM, 1827.

Breaux *v.* Gireaud. V, N. S. 509.

FIRST District.

If the sheriff actually swore to his return of a citation of appeal, and the clerk omitted to add the *jurat*, the appellant has a right to have the omission supplied.

Case remanded, with directions to the judge to order the clerk, if the sheriff did swear to his return, to add the *jurat* thereto, and if he did not, or the clerk does not recollect that he did, to receive the sheriff's affidavit; and it is ordered, that the appellee pay costs.

Allain *v.* Whitaker *et al.* V, N. S. 511.

The declaration of a notary that he gave notice of the protest of a note, must be recorded under his signature and that of two witnesses.

Whether it ought not to state in what post-office the notice was put.

THIRD District.

[Allain v. Whitaker *et al.*]

PORTER, J., delivered the opinion of the court.

This action was brought against the drawers and endorser of a promissory note. The drawers suffered judgment by default to be taken against them, and permitted the same to be made final. The endorser pleaded to the action, and judgment being rendered against him, he appealed.

The answer averred, that service of the petition and citation had not been made in the French language, on the defendant, though it was his mother tongue. That no notice of protest had been given him—nor had payment been demanded of the maker. That after the maturity of the note, time had been given to him without the consent of the defendant.

The first question presented on the record, arises on a bill of exceptions. The defendant objected to the note being read in evidence, because the endorsement was in blank. The judge overruled this objection, and in our opinion correctly. It has been repeatedly decided in this court, that an endorsement in blank passes the interest of the endorser in a commercial note, and that the holder may maintain an action on it as endorsee.

The exception to the service of the petition is contradicted by the sheriff's return, which expressly states that copies of the petition and citation were left with the defendant in the French language.

The uniform practice in this state has been to receive the protests of notaries as evidence of demand on the maker of a note or acceptor of a bill of exchange. The distinction on this head between inland and foreign bills, which is known to the English law, has never been in our experience adopted by us. The legislature, by directing the notaries to record all protests made by them, seem to have acted on, and sanctioned the usage which already existed, to admit them in evidence. No good reason exists, why we should give more faith to a foreign notary, than to one of our own officers. That of convenience is not sufficient to establish the distinction, for there would be nearly as much inconvenience produced by refusing the one as the other. We therefore think, the protest offered in this case, was good evidence to prove that demand had been made on the drawer.

The notice certified by the notary, under the act of 1821, we rather think does not comply with the provisions of that statute. It is in these words: First endorser notified by written notification, by mail, at St. Francisville, 5th July, 1824, by Joseph Trinchard. The statute requires, that the names of the drawers and endorsers, together with the manner in which the notices were served or forwarded to them, shall be furnished by the notary. That given here does not state in what post-office the notice was put, and we cannot supply, by presumption, any thing wanting in evidence of this kind, which the endorser had not an opportunity of cross-examining.

But admitting this objection, on which we express no positive opinion, could be got over, there is a still more fatal one, to the introduction of the certificate. The statute requires that the declaration of

the notary shall be recorded under his signature, and that of two witnesses. In the present case, the declaration was recorded without any. There were two witnesses to the protest. But none appears to the record, which the law requires the notary to make of the manner he gave the notices of that protest, and without them the declaration is clearly not evidence. Act of 1821, p. 44.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment against the plaintiff, as in case of nonsuit, with costs in both courts.

Eustis, for the appellee.

Ripley and *Conrad*, for the appellant.

Bird *v.* M'Micken. V, N. S. 515.

COURT of Probates of West Feliciana.

A case is prematurely heard on the merits when all proper parties are not notified, and judgment by default taken, or issue joined.

Balfour *v.* Chew. V, N. S. 517.

The copy of the probate of a will is the copy of a judicial proceeding, which must be certified under the act of congress of 1790.

THIRD District.

PORTER, J., delivered the opinion of the court.

This case commenced by an application for an injunction, to prevent the defendant selling certain slaves mentioned in the petition, which the plaintiff alleges to be her property. The answer denies her title,

and asserts that the defendant had seized the negroes in consequence of a mortgage given on them by the husband of the petitioner.

The real difficulty in the case is, whether the slaves were the property of the husband or wife; and its solution depends on the effect of certain transactions which took place in North Carolina; from which state, the parties, long after their marriage, moved into this. It is admitted the slaves were the property of the father of the petitioner; and it is contended, on the part of the wife, that the title remained in him, until after she and her husband removed into this state. On the part of the defendant, it is urged, that the negroes were conveyed to the wife while she lived in North Carolina, by gift from her father; and that, in consequence of a title vesting in her while there, the husband became the owner of them before he came into Louisiana, and that they are subject to his debts.

The wife, in support of her claim, produced the record of the last will and testament of her father, made since she came into this state. It purported to have been admitted to probate in Bulie county, North Carolina. The reading of it was objected to by the defendant, on the ground that it was not certified according to law. The court sustained the objection, and the plaintiff excepted.

In this court, the objection has been maintained, on the ground that this was not the copy of a *judicial proceeding*, which could be certified under the act of congress, passed in the year 1790; but that it was the record or exemplification of an office book, not appertaining to a court, which should have been proved in the manner directed by the law of 1800, supplementary to the act already referred to. Ingersoll's Dig. (ed. 1825,) 298 and 299.

We are clearly of opinion, that the objection is unsound. The admitting a will to probate is certainly not a ministerial act. It is a judicial proceeding; and the record of it cannot be called a book not appertaining to a court. The certificate given here, most certainly proves the contrary. It designates the *term* at which the will was proved—it states the proof to have been made in *open court*, and that it was *ordered* to be recorded.

Another objection has been made in this court, which, for aught we can learn from the bill of exceptions, was not made in the court below; namely, that the clerk does not set out at length, the oaths of the witnesses proving the will; but has stated the will was proved by the oaths of the witnesses therein mentioned—or, in other words, that he has substituted his conclusion of what was proved, for the proof itself.

If this was a good reason to reject the will, we would hesitate to give the defendant the benefit of the objection. He should have opposed the introduction of the proof on that ground, and have given his adversary an opportunity of showing, that by the laws of that state, it was not necessary to insert the oaths of the witnesses who prove a will, at length, on the record.

The principle on which the defendant opposes the reading of the

instrument, is a correct one. Clerks are only authorised to give and certify copies, and as they are merely ministerial officers, they have no right to state what has been done, in any other manner but by furnishing a transcript of the record of what was done. But in the case before us, we see no ground to apply this doctrine. The statement at the bottom of the will, purports to be an extract from the records of the court. We are bound to believe, as the clerk has told us, that it is a *true copy;* and if it be, we are directed by the act of congress, to give it the same faith and credit, it had in the state from whence it came. It lies on the defendant to show, that it was improperly admitted to record. This, he has not done; and if he had, so long as the judgment of the court stood unreversed by which it is ordered to be recorded, we could not refuse it effect here. Smoot *et al. v.* Russell, 1 *N. S.* 522.

With this view of the correctness of the judge's opinion in relation to the evidence, as the cause was tried by a jury, the most regular course would be to remand it for a new trial; but as both parties have pressed us to give a final decision, and the principal question is one of law, not of fact, we shall examine the case on its merits.

Some of the negroes claimed by the plaintiff in this suit, were sent by her father to the house of her husband some time after her marriage, and have remained in his possession ever since. Admitting for a moment there were no evidence to take this case out of the presumptions which the laws of that state raise on such a transaction, the consequence would be that the property would vest in the husband. This has been satisfactorily shown to be the rule in North Carolina. 1 Haywood, 97; 2 *Ibid.* 72. But in opposition to this rule, which appears clearly established by the decisions of the courts of that state, the counsel for the plaintiff has produced an act of its general assembly, passed in the year 1784, by which it is required that deeds, or gifts of any estate, shall be proved in due form and recorded; and it is father declared, that deeds of gift not authenticated, and perpetuated in the manner prescribed by the act shall be null. He has also read cases from the same book, relied on by the defendant, that gifts, by parol, are considered void and of no effect.

These decisions, which, at first blush, appear to be contradictory, on a closer examination, are easily reconciled with each other. The cases in which gifts by parol have been considered good, arose between the donor or his representatives, and the donee. Those in which such conveyances have been held bad, were decided on a contest between the donee and creditors, or subsequent purchasers. The words of the act of 1784, do not require all deeds of gift to be reduced to writing. They only render it necessary to record all those which are reduced to writing. But the courts of North Carolina, from a conviction of the intention of the legislature, as evidenced by the preamble to the statute, have held, that as to creditors, or subsequent purchasers, such deeds were null, and could have no effect. This distinction between third parties, and the donor or his

representatives, is clearly established by two cases not cited in argument, which are reported in 2 Haywood's N. Carolina Reports, 87: and 3 Haywood's Tennessee Reports, 4.

The position, then, which the wife has attempted to maintain here, that the property could not vest in her without a deed of gift, is wholly untenable. The title, though by parol, vested immediately, and became subsequently *void*, if not registered; that is, voidable, at the instance of creditors, and subsequent purchasers. 3 Haywood Tenn. Reports, 4.

If then it was vested in her in North Carolina, it became the property of her husband there; and, consequently, was his, when he removed into this state, and as such, was properly seized by the sheriff, to satisfy an execution against him.

In opposition to the presumption of law, relied on by the defendant that the slaves became the property of the husband by being sent, or delivered to the wife after marriage by her father, the plaintiff introduced parol evidence to show that they were received as a loan and not as a gift.

The evidence on this head is, that the plaintiff intermarried with her present husband, about the year 1807; and that in the same year some negroes were lent by the father of the petitioner, and taken possession of by her husband. In the year 1807, the witness by whom the fact is stated, declares, that he went to Bulie county, in North Carolina, with his step-mother, the plaintiff, and that the day they were leaving her father's house, he called up two negroes, Bridget and Tony, and said to the by-standers, "take notice, that I lend to my daughter, Nancy Balfour, these negroes, in the same manner that I have the other negroes, (alluding to those formerly delivered to her,) and in no other manner."

The last will and testament of the father, also shows that he disposed of the slaves which his daughter had received, as if they made a part of his property; he made a loan of them to her for life, and gave them, after her decease, in full property to her children.

The courts of North Carolina have decided "that when property is permitted to remain in possession of the son-in-law for a considerable length of time, it will be necessary to prove very clearly, that the property was only lent by the father, and that it was expressly and notoriously understood not to be a gift at the time." 1 Haywood, 98.

With regard to the two negroes received in the year 1820, we think the evidence fully proves they were delivered as a loan, and every publicity was given to that fact the case was susceptible of. The father, on putting them into possession of his daughter, called on the by-standers to observe that they were lent by him, and that the transaction was to be understood in no other manner.

But in regard to those which were sent to the wife immediately after the marriage, the proof is by no means satisfactory. The declaration of the father, years after the slaves were delivered, and at the time he was sending others away, cannot change the character

of the original transaction. It is very weak proof of what it really was. The law of that country, so far as we have been able to gather it from the decisions of their courts is that it must be expressly and notoriously understood at the time the property is delivered, that a loan, not a gift, is contemplated. Some of the decisions to which we have already referred, were made on facts where the father, as here, disposed of the slaves by last will and testament. But this declaration, on his part, that he had not given them to his daughter, was held insufficient to destroy the presumption which the law raised on the fact of his sending them after marriage, without an express understanding that they were lent, and not given. There is then no other proof of their being delivered as a loan, but that furnished by the witness Balfour; and his testimony is not strong enough to bring the case of the plaintiff within the rules of law which governed the transaction in the country where it took place. He merely states, that some negroes were lent. He gives none of the circumstances which attended the delivery; nor how he came by his knowledge. He does not say whether it was so understood in the place in which they lived or whether the condition in which they were put into the possession of the husband and wife, was known only to their own family. The witness is a step-son of the plaintiff. This is certainly not proving that the slaves were expressly and notoriously delivered as a loan; and we conclude, as to them, the plaintiff has failed to make out title.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and proceeding to give such judgment here as, in our opinion, should have been given in the court below, it is ordered, adjudged and decreed, that the injunction granted in the case, so far as relates to the slave Bridget, be made perpetual; and it is further ordered and decreed, as it respects the other slaves, mentioned in the petition, that the injunction be dissolved; and that the defendant pay costs in both courts.

Preston, for the appellant.

Watts and *Lobdell*, for the appellee.

Lacroix *v.* Coquet. V, N. S. 527.

A woman cannot be surety.
The provisions of the Spanish law prohibiting it are not repealed by the Civil Code.

FIRST District.

PORTER, J., delivered the opinion of the court.

The only question in this cause is whether a woman can become surety for the debt of another.

The second law of the twelfth title of the fifth Partida, expressly prohibits women from becoming responsible for the debts of others. The succeeding law makes some exceptions to this rule, but the case does not come within them.

It has been contended here that the provision of the Spanish law is repealed by the Civil Code.

It provides that "every person may contract, unless declared incapable by law."

Persons incapable of contracting are, slaves, minors, persons under interdiction, married women in cases expressed by law, and generally all those to whom the law has interdicted certain contracts. Civil Code, 204, art. 23 and 24.

One of those to whom the law has interdicted certain contracts, are women who become sureties for another. Therefore, according to the affirmative and express terms of the article cited, the provision in the Partidas is preserved—not repealed.

Subsequent laws do not repeal former ones by containing different provisions; they must be contrary. But in the present case the new law is neither contrary to, nor different from the old.

Similar provisions in the Napoleon Code have been considered as repealing a prohibition of the same kind in their jurisprudence, but the legislature of France, in promulgating the Napoleon Code, passed a law that all the dispositions of the Roman law concerning the matters which formed the object of that Code were repealed.

No doubt, therefore, that in France their Code repealed the provisions of their former law on any subject of which the code treated. But our digest of the civil laws was enacted without any such legislative declaration, consequently it is subject to the ordinary rules, which govern courts of justice in the construction of statutes.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the injunction granted in this case be made perpetual, and that the plaintiff pay costs in both courts.

Denis, for the plaintiff.

Trabuc, for the defendant.

Flower *et al. v.* Swift. V, N. S. 529.

COURT of Probates of West Feliciana.

Held, an executor is not suable in the court of probates, on his endorsement of a note payable to the estate.

Brooke *et al. v.* Louisiana State Insurance Company. V, N. S. 530.

A *constructive* total loss is excluded in all memorandum articles.

When mules are insured against *a total loss*, nothing short of a physical total loss of the whole number insured, will render the assurers responsible.

The law of insurance is the same in this state as in the other states of the Union.

FIRST District.

PORTER, J., delivered the opinion of the court.

This case came before the court at the close of the last June term, and was decided by two of the judges, in favor of the plaintiff. An application for a rehearing having excited doubts in our minds, in relation to the correctness of our judgment, we granted the request of the defendants, that it should be tried again. It has been now heard before a full court, and has been most carefully and ably argued. 4 *N. S.* 641, and 681.

I agree with the presiding judge of the court in the conclusion to which he has arrived: but as the reasons by which my mind has finally, and with much hesitation, come to that conclusion, are not the same which seem to influence him, I think proper to state those that have induced me to change my opinion.

I retain my former impressions, in respect to the intention of the parties: but admit that intention is not so clearly proved, as to authorise us to deviate from the legal signification of the terms used in the

contract. If the case were decided on principle alone, unfettered by authority, I should think the plaintiff entitled to recover. I see no absurdity whatever, in considering the words "total loss," to refer to the entire destruction of one mule, as well as to the whole cargo. There can be no dispute about the literal meaning of the words; but the question is whether the intention of the parties, and the rules of law do not affix a technical meaning to them in this policy. In regard to articles other than memoranda, the words "total loss" mean a loss of one half: this is the uniform and admitted meaning given to the expression, and parties using them in relation to such a subject, would be understood to use them in their legal sense. And yet in such a case, every argument that we have heard in respect to a part, not being the whole, and that less than the whole is not a total loss, would apply with as much force, as to that now before the court.

I see, therefore, nothing absurd in the decision which the courts in England have made on this subject. Nor can I agree that the doctrine rests on the authority of a single individual. It is the decision of the whole court of king's bench. It was acquiesced in at the time, by the counsel who argued the cause. Had they doubted its correctness, they could, and it is to be presumed, would have taken it to a higher tribunal. The court of common pleas have recognised the same doctrine. It has not been controverted since, though in a country so eminently commercial as England, a vast number of cases must have arisen where it was the interest of parties to establish a different principle. Those who know with what zeal and learning, the doctrines which fall from the bench in that country, are examined by the profession, when, in their opinion, they are unsupported by reason and law, will feel what weight this consideration is entitled to. In addition to this, it has been shown on the last argument, that in the latest work published in England on insurance, the question is considered as settled, and the writer states the rule without expressing a doubt as to its correctness. Benecke on Insurance.

It is a very unsatisfactory way of assailing authority in questions of law, to trace it up to its source, and then say, no matter how often it has been sanctioned, or how long acquiesced in, that it is but the opinion of the individual with whom it originated. Every doctrine in jurisprudence might be assailed and overturned in this way, for they must all have had a beginning. The opinions of jurists, and tribunals derive their authority from the reasons on which they are founded, the sanction which others have given to them; or the length of time they have been acquiesced in without opposition; and their authority is not diminished, by showing that they had their origin with a particular jurist, judge, or court.

I consider the rule, then, well settled in England, and I believe it would be the most equitable in its application in the instance before us. Perhaps it was this feeling pressing strongly on my mind, after the first argument, that induced me too readily to conclude, that the weight of authority was equal. Further examination, and longer

time for reflection, have convinced me it is not, that it is decidedly with the defendants, and I feel it my duty to yield my opinions to those we have taken as guides in these matters.

We are in this state without any legislative enactments on the contract of insurance, and this court after much argument and great deliberation, declared on a former occasion, for reasons which need not be here repeated, that this contract must be construed in relation to the law merchant as understood in the other maritime cities of the Union. This decision has been for some time before the community. The legislature have not thought proper to prescribe to us a different rule. We are therefore bound to consider, that the parties to this suit contracted in relation to those principles of law which we declared should govern such contracts: *Semper in stipulationibus in cæteris contractibus id sequimur, quod actum est: aut si non appareat, quid actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequentatur. Dig. Liv.* 50, *tit.* 17, *liv.* 34.

I agree with the counsel for the plaintiffs, that there is nothing in the expressions used by the court, in the case of Barry *v.* The Louisiana Insurance Company, which binds this court to adopt, from time to time, every rule which the tribunals of our sister states may establish in relation to this matter. We did not intend by such declaration to place our understanding of the law under the control of others. And if any doctrine should be settled by them at variance with rules which already existed, or contrary to our understanding of the *lex mercatoria,* we should certainly respect their opinions, but we would follow our own.

But at the time this court declared that the contract of insurance must be understood here as it is in the other maritime cities of the Union, the rule was already settled in every state where the question had arisen, and in the Supreme Court of the United States, in relation to words which we believe to be convertible with those used in this policy; that nothing short of an absolute destruction of the whole property insured, would render the assurers responsible, and if any portion reached the port of destination, they were discharged from liability. 7 Cranch, 415; 8 *Ibid.* 39; 1 Caines,196; 1 Wheaton, 219; 7 Johnson, 527; 6 Mass. 465.

Now, however the force of authority might be in another country that had not previously made choice of the rules prevailing in the Union, there can be no doubt that after that *lex mercatoria* was chosen as our rule of action here, there was error in saying that the weight of authority was equal. It most decidedly preponderates in favor of the defendants.

Being so, I cannot depart from it in the decision of this case. Whatever the fact may be, we are bound, in the absence of any proof to the contrary, to believe that the parties contracted in relation to the law, as expounded to them by the tribunal of last resort in the country they live in. Having done so, we cannot now tell them

their right must be ascertained by a law which, though of a common origin, and alike on almost every other question in relation to insurance, has on this particular branch of the subject, a different and contrary rule.

I concur, therefore, in the opinion, that the judgment of the court below should be reversed; and that there should be judgment here for the defendants.

MARTIN, J.—I still retain the opinion I formed last summer, that, on principle, the law is in this case with the plaintiffs; but the argument on the rehearing and a further consideration of the case, have convinced me that the decisions of the courts of this state, and of the Union, support the plea of the defendant. I therefore yield to the current of authorities, conscious that it is not my own individual opinion of the right of the parties, which I am to pronounce; but that which I think to be in accordance with the law of the land, evidenced by the decision of courts.

It is clear, that in the highest tribunals of the principal states in the Union, and in the Supreme Court of the United States, the plea of the defendants would be sustained, and I agree with my colleagues in the opinion that it must prevail here.

MATHEWS, J.—This case was before the court, in June term, 1826, and was then argued and adjudged; but a rehearing having been allowed, on the application of the defendants, who are here appellants, we are now obliged to inquire into the correctness of our former judgment.

The suit is brought on a valued policy of insurance, in virtue of which, the plaintiffs claim to recover from the defendants 11,000 dollars; being the estimated value of a cargo of mules, insured from St. Yago, in Mexico, to Havana, in Cuba.

The policy is drawn up in the usual form of such instruments, containing a printed memorandum which excepts from average, unless general, or amounting to a certain percentage, several articles of commerce therein enumerated; and also a written clause, stating the amount or value of the cargo insured; the kind of property of which it was to be composed, and its situation in the vessel; and concludes by declaring the "insurance to be against stranding or a total loss."

The evidence of the case shows, that in pursuance of the policy thus obtained, the plaintiffs put on board the vessel designated therein, seventy-four mules, being the species of property which was to constitute her cargo, according to the written clause of the instrument; that out of the whole number of animals composing the cargo insured, thirty-five were entirely lost, in consequence of the occurrence of perils, against which insurance was effected, and the balance (being thirty-nine) found to be much injured, and lessened in value, on their arrival at the port of destination. An abandonment was tendered to, but refused by, the defendants, from whom the plaintiffs claim the

entire value of the cargo, as for a total loss; or such other sum as may appear to be due to them on the policy. Their right to recover, is denied *in toto.*

The various grounds of opposition to the justice and legality of this claim, set forth in the points filed by the defendants, have been examined by the court, as may be seen in the judgment heretofore rendered. The principles therein settled and established, are as follow: 1st. According to a just interpretation of the written clause in the policy, the entire cargo of mules is placed on the footing of articles excepted from partial loss, in the ordinary memorandums of such instruments: 2d. A constructive or technical total loss, is excluded from such articles: 3d. Admitting that recovery might be had for a partial loss, the jury to whom the cause was submitted, in the court below, and who found a verdict in favor of the plaintiffs, for 4500 dollars, pursued a legal and proper course, in adjusting the extent of loss, by an estimate made in reference to the valuation ascertained and fixed by the policy: 4th. If part of a cargo, consisting of separate and distinct objects, be entirely lost, even should it be composed of memorandum articles, the assured have a right to recover the value of any one or more, of the objects so lost, although not amounting to a loss of the whole cargo, either physically or in value. *See the opinion of the court as reported in* 4 *N. S.* 640 *et seq.*

Of the soundness and legality of these principles, so established, we entertain no doubt, except the last, which requires to be again examined and tested, by those rules which ought to be received as of binding force and authority, in relation to contracts of insurance made in this state.

We shall consider the question solely in reference to principles which regard memorandum articles, such as are excluded from indemnity except for a total loss, or in other words, from average unless general. Considered in this light, the counsel for the defendants contended, that as part of the cargo, composed as above stated, arrived at the port of destination, and was of some value, they are entirely exonerated from every species of obligation to indemnify the assured.

The effect of the memorandum on articles therein specified in a policy of insurance, and the extent of the obligations which such a clause creates, have frequently been subjects of discussion in the courts of the United States, and those of the states individually, and the doctrine established by the decisions of those courts, in cases similar to that now under consideration, is relied on by the appellants as decisive of the present controversy in their favor. They have been cited, and commented on in the written argument, as well as at the bar; we have examined them attentively, and are of opinion that they fully support the ground of defence assumed without variance or exception. Vide 7 Cranch, 415; 8 *Ibid.* 39; 1 Wheaton, 219; 1 Caines, 296; 3 *Ibid.* 198; 6 Mass. 465; 7 Johnson, 527.

As the doctrine contended for by the defendants appears to be firmly settled by the uniform tenor of the decisions in these cases, and has thus become a part of the *lex mercatoria* of the United States, our attention is directed to the case of Barry *v.* The Louisiana Insurance Company, adjudged by this court, as reported in 12 *Martin*, beginning at page 493, wherein it was declared unequivocally, "that the contract of assurance is understood here as it is in the other maritime cities of the United States."

From the reasoning of the opinion in that case, it is readily perceived that the court in consequence of the absence of any positive and express provision in our laws on the subject, rightfully assumed the privilege of declaring the rules which prevail in the other states of the Union, in relation to the contract of insurance, to be applicable to such contracts when made in this state, as the adoption of such as might be different and repugnant, would cause great inconvenience to merchants throughout our confederation, arising from various and conflicting laws, existing within the same federative government on the subject of commerce.

After such a public and solemn declaration of the law of this state, in relation to commerce, it must be believed that all contracts of insurance are made and entered into, in reference to it (thus declared), as the exclusive rule of interpretation, whenever contests or legal controversies may arise as to their true meaning and effect.

This view of the subject alone would, perhaps, be sufficient to show the error of our former judgment. But the counsel for the appellees strenuously contend, that as the clause of the policy, now under examination, differs essentially from the stipulations contained in those on which the decisions referred to are based, it should receive a different construction and interpretation. We have already stated our entire satisfaction with that part of the former judgment, and firm belief in its truth and soundness, which places the whole cargo of mules on the footing of memorandum articles. If this interpretation of the clause in question be correct, it refutes completely the objections made to the applicability of the cases cited from American reports, and the conclusiveness of the decisions therein found, in favor of the pretensions of the defendants; and surely it cannot be seriously asserted, that any difference exists between the legal import and meaning of an exception in the policy of insurance, by which the insurers are made responsible for a total loss only, and one which limits their liability to indemnify for general average alone. See Phillips on Insurance, 489.

Thus far the court is unanimous in the reasoning against the correctness of our former judgment.

But supposing the doctrine, as we have assumed it to be, that which the courts of justice of the United States, both federal and state, have recognised and established for the government of cases similar to the present; it is contended, on the part of the plaintiffs, that it is unjust in itself, and heterodox in deviating from equitable

principles, as ascertained and established by the decisions of the highest tribunals in England, from which the rules adopted in America have been extracted and received as binding, in consequence of their consistency with reason, equity and justice.

I have examined the cases cited, and relied on by the appellees, and find only one, which fully supports the doctrine for which they contend; that of Davy *v.* Melford, reported in 15 East, 559.

It is true, that C. J. Gibbs, in the course of his observations, on the trial of the case of Headberg *v.* Pearson, seems to have held as true, the doctrine established in the case of Davy *v.* Melford; but these observations were mere *obiter dicta.* See Phill. on Insurance, 488. From the decisions in these cases, Benecke, in his treatise on Marine Insurance, lays it down as a rule settled in England, that if part of the goods insured, be wholly lost, and another part saved, that which is wholly lost, is considered as a total loss on the underwriters. See his book, p. 376.

The decision on which this rule appears to be mainly based, has been strictly examined by one of the advocates for the defendants; and I think his animadversions thereon, are made with considerable accuracy and justness, both in relation to grammatical and legal interpretation.

But whatever may be the rule in England, with regard to dividing a cargo, composed of separate and distinct objects, for the purpose of enlarging the stipulation in a contract of insurance, which limits the responsibility of insurers to a total loss only, it is believed that none such exist in the United States, or in this state. The clear, evident, and ordinary meaning of the written clause in the policy, on which the present suit is founded, according to just grammatical and legal construction, limits the liability of the defendants to indemnify, for such loss only, as amounts to an entire physical destruction of the whole cargo, or perhaps a total loss as to the value; neither of which has occurred, as shown by the testimony of the cause. No injustice takes place—no violence is done to the principle of equity and natural right, by interpreting contracts according to the legal and ordinary import and meaning of the words used in making them, as arranged in grammatical construction—such meaning, as every person acquainted with the structure of language, would attach to them. If the plaintiffs mistook the nature and extent of the indemnity, which the defendants obliged themselves to make in pursuance of their contract of assurance, and have, thereby, suffered loss; the fault is their own—it is *damnum absque injuria*, for which remuneration cannot be rightfully claimed.

Morse and *Grymes*, for the plaintiffs.

Workman and *Eustis*, for the defendants.

Dicks *et al.* v. O'Connor. V, N. S. 547.

Suit may be brought without the privity and in the name of the party who transferred it, for the use of the transferee.

THIRD District.

MARTIN, J., delivered the opinion of the court.

The plaintiffs, who sue to the use of Pope, demand, as endorsee of Colt, the amount of the defendant's promissory note.

The defendant denied the plaintiffs' right of action on said note, as they had not any interest in it; having given it to Pope, in payment of a house, and alleges she entrusted Colt with her signatures on three distinct pieces of paper, for the purpose of procuring money thereby, for her use—that he made the note sued upon with defendant's signature, on one of these pieces of paper, and employed it to pay a debt of his, in place of the defendant's—a circumstance well known to Pope before he had traded for said note. The general issue was pleaded, and the answer concludes, the suit is brought without the knowledge, privity or consent, of Dicks *et al.*

N. Dick deposed, he gave the note sued on, to Pope, in payment of a negro woman; that the present suit was brought without his knowledge or consent, but has his full approbation.

There was judgment against the defendant, and she appealed.

The appellant's counsel has contended, that no suit can be maintained in this state to the use of another, because there exists no necessity or use for this mode of proceeding. We think, in the present case, there was a necessity and use for bringing this action.

The nominal plaintiffs having obtained this note before its maturity, and passed it by delivery to Pope; had the latter brought suit as the immediate endorsee of Colt, he could not have refused any equitable defence which could have been objected to Colt. Had he taken the endorsement of the nominal plaintiffs, the difficulty would have been the same. The nominal plaintiffs having, at the time of the transfer, a fair, and absolute right to demand payment from the defendant. This right was the fair object of the contract between them and the real plaintiff; and this right could only be properly transferred, and enforced, by the delivery of the note unendorsed by the nominal plaintiffs, with leave to exert it, in their name, in its plenitude at the time of the transfer. In doing so, the nominal plaintiff did no injury to the defendant; for she (the defendant) was not, by the transfer, put in a worse condition than she had placed herself and remained in.

If the nominal plaintiffs had an absolute right to compel payment, it is immaterial whether it is exerted in their own right and for their own use, or in their own right for the use of their transferree.

On the merits, we think the case is with the plaintiff, although it be granted that Colt abused the defendant's confidence, and defrauded her. She trusted in him, and must bear the consequences of her indiscretion; and cannot throw them on those whom she enabled Colt to deceive. She admits her signature was put on a blank piece of paper, with the intention that Colt, to whom she delivered it, should write on it a promissory note, on which he might raise money, for her own use. He wrote the note, and raised the money; but applied it to his own use. Now, the rule is, he who trusts, must lose.

The nominal plaintiffs, who bought the note fairly, at a time not suspicious, ought not to lose. Their right, in its plentitude, was purchased by the real plaintiff. He used it, as it stood before the sale. The names of two plaintiffs are on the record. If the defendant has a compensation to oppose to either, she may do so with success; provided, that opposed to the nominal plaintiffs be anterior to her knowledge of the transfer. If the nominal plaintiffs, at the time they received the note from Colt, were bound to allow any equitable defence they are still plaintiffs, and it will avail against them and the real plaintiff. If, while the note was in their hands, the defendant acquired any right which she might oppose to them, that right is unaffected by their transfer of the note.

If the real plaintiff has, by any act of his own, since the transfer, afforded any right to the defendant, by receiving payment, wholly or partially, or was before, or became since indebted to the defendant, the plea of payment, or compensation, must avail.

The right to be examined in this cause, is that of the nominal plaintiffs, such as it was at the moment they passed the note to the real.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Woodroof, for the plaintiffs.

Watts and *Lobdell*, for the defendant.

Millaudon *v.* Percy *et al.* V, N. S. 551.

An inventory is to precede the partition of every estate.
But it may be made after the partition is ordered.
The report of the experts on the expediency of selling, is not conclusive.

FIRST District.

PORTER, J., delivered the opinion of the court.

The plaintiff states, that he is joint owner with defendant, of a sugar plantation, situated in the parish of Jefferson; that he does not wish to remain so any longer, and that the property cannot be conveniently divided. He, therefore, prays that his part of the property may be sold for cash, and the defendant's on such terms and conditions as he may think proper.

The defendant admits he is owner of an undivided fourteenth part of the plantation, and negroes described in the plaintiff's petition; but denies that the plaintiff is owner of the other thirteen fourteenths.

He also states, that the plaintiff cannot have a partition, because he is illegally in possession of the property, and has refused to render an account of the profits; and that it would be contrary to justice and the interest of the defendant to have the property sold in one lot.

After the cause had been at issue for some time on these allegations, Martin intervened, and stated, that he was interested in the cause, being part owner for a twenty-eighth undivided part of the plantation; and that his claim being contested, he had commenced suit against the plaintiff to have his right settled. He, therefore, prayed, that the court would not order a sale of the property until his claim should be decided.

The court decreed the plantation and slaves to be sold together, the plaintiff's proportion to be sold for cash, and the defendant's and the intervening party's, at such terms of credit as they might think fit.

The defendant and the interpleader both appealed.

A consent appears on record, signed by the counsel for the plaintiff and defendant, that three experts should be appointed to ascertain whether it be more advantageous to sell the plantation in one lot, than to sell the slaves each separately, and the plantation also separately from the slaves.

These experts reported, that it would be more advantageous to sell them together.

The first question for our decision, is presented on a bill of exceptions. The defendant, before the cause was opened, moved that an inventory might be made of the property held in common, between

him and the plaintiff, according to the 1247th article of the Civil Code.

That article is in the following words :—"Every judicial partition shall be preceded by an inventory, in which the effects to be divided, shall be appraised, according to the form prescribed for public inventories."

It has been contended, that as this provision has been found under the head of successions, it does not apply to a case, such as that before us.

There would be a great deal of weight in this argument, if the 1304th article, contained in the same section of the Code with that already cited, did not declare, that "all the rules established *in the present section*, with the exception of that which relates to collations, are applicable to partitioners between co-proprietors of the same thing, when among the co-proprietors, any are absent, minors, or interdicted, or when the co-proprietors, of age and present, cannot agree on the partition, and the manner of making it."

We do not see how this direction can be dispensed with, and of that opinion was the judge below; for though he refused to continue the cause until an inventory could be made, he ordered, that it should be taken before the property was sold. So that, the only question before us is, as to the time, and we think the judge was right to hear and decide on the propriety of making a partition, and the manner in which it should be made, before he directed an inventory to be taken. It was sufficient, if done at any time before the sale, provided a sufficient period was allowed to enable the parties to have the errors in it corrected. The only objection, we think, which the defendant can make to the judgment on this head, is, that it does not, by prescribing a certain time for the inventory, and for the sale, show that there was a sufficient interval between them to enable the party aggrieved to have redress. But the opinion we have formed on another part of the case, renders it unnecessary to decide this point.

It has been already stated, that experts were appointed, to report whether it would be advantageous to sell the property in mass, and that they gave their opinion in the affirmative. When the case was on trial, the defendant offered evidence to show that the opinion of the experts was erroneous. This evidence, the judge refused, and the appellant excepted.

This proceeding, of appointing *experts*, to report their opinion on the main question in the cause, is quite novel to us. We should have thought that, when the parties put their case to the court on the pleadings, it was for it to decide, after hearing the evidence, whether the partition was to be made, and how it was to be made—in kind, or by a sale. However, as the parties chose to have their opinion, we need not inquire into the propriety of the course pursued.—The only question we are called on to decide, is, the effect of the report. By the one party, it is contended to be conclusive; by the other, that nothing more was contemplated than to have the assistance of the

experts, and the information they might afford, by the knowledge they were presumed to possess on the subject.

The latter is the only purpose for which the law intends they should be appointed; and it is expressly declared, that the court is not bound to follow the opinion of the experts, in the decision of a case. Code of Practice, art. 452, and 458.

But the appellee contends that the appellant cannot have the benefit of this rule, because he suffered the report to be confirmed without opposition. None was filed in writing, as it is required by law, it should be. Code of Practice, 457.

The law certainly supports the appellee in this objection; but then, if he insists on this severe practice, it is proper he should be bound by the same rules himself, and the article of the Code of Practice just preceding that quoted by him against the appellant, requires that the party wishing to avail himself of the report of experts, &c. must call on the adverse party, to show cause in ten days, why the same should not be homologated.

The record shows here, that the defendant was called to answer it in five days; and certainly he was not, and can not be considered in default for not answering this notice. Nor is the matter cured by the case being afterwards continued. We cannot, from that circumstance, imply a waiver of the irregularity. If we did, we should also be obliged to extend to the appellant, the benefit of the same presumption, and hold that the "calling the cause for hearing," was a waiver on the part of the appellee, that the opposition should be made in writing.

As the plaintiff, therefore, committed the first fault, he must take the consequences of it, and as the report should not have been confirmed, nor the testimony offered by the defendant in opposition to it, rejected, the case must be remanded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be remanded, to be proceeded in according to law; the appellee paying the costs of this appeal.

Seghers and *Grymes*, for the plaintiff.

Denis, for the defendants.

Fox v. Adams. V, N. S. 558.

A party is liable personally, though credit was refused him, and the promise of a third was required.

FOURTH District.

MARTIN, J., delivered the opinion of the court.

The defendant, sued for the hire of certain negroes of the plaintiff, pleaded the general issue; but admitted he had the plaintiff's negroes, but they were hired for the account of W. Kenner and Co.—that the plaintiff refused to hire them to the defendant. There was judgment against him, and he appealed.

The record shows that at the trial the defendant did admit that the plaintiff's negroes, mentioned in the petition, worked on his, the defendant's plantation, during the period stated in the petition.

Barney deposed he several times heard the defendant say he was to pay the plaintiff 1200 dollars, for the hire of his negroes, for the year 1825.

A letter of the defendant's, to the plaintiff, bearing date, Jan. 21, 1825, was produced. The defendant thereby promised to pay the plaintiff for his negroes the same price as the preceding year, or that if he, the plaintiff, would write to Clague or Minor what they would give, and he would give as much as either of them.

Erwin, a witness for the defendant, deposed to a conversation between the parties, in which the plaintiff refused to have any thing to do with the defendant, to trust him for a cent; but declared his readiness to give the negroes, if Kenner & Co. would assume the payment of the hire. The witness understood from the latter gentlemen they had assumed the payment.

On these facts we think the judgment was correctly rendered for the plaintiff. The defendant's written promise, corroborated by his positive declaration, if they do not outweigh Erwin's testimony, certainly show that the parties understood that the interference of Kenner & Co., in the contract, was required as a security, of the defendant, who was, notwithstanding it, personally liable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Davezac, for the plaintiff.

Morse, for the defendant.

Flood *v.* Thomas. V, N. S. 560.

A witness is not to be entirely believed if it be shown that the facts related took place on a different day from that which he stated.

A debt due by another, is a sufficient consideration to support the promise of a third party to pay it.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The defendant is sued on his promise to pay 678 dollars and 71 cents, due the plaintiff by Lee. He pleaded the general issue, and the want of consideration in the alleged promise; judgment was given for him; and the plaintiff appealed.

The record shows that Sprigg deposed, that to his knowledge, the account annexed to the petition is justly due—that Lee acknowledged it, and requested the defendant to pay it; and he promised so to do, according to the memorandum then written by the witness on the back of the account.

This memorandum states, the defendant on the 30th of May, 1825, promised to pay the account, viz: 150 dollars before he left the city for Alvarado, and the balance on his return.

Lee admitted the debt, due by him, to be about 500 dollars, or upwards; but deposed he neither recollected nor believed the account was presented him by Sprigg; that the defendant paid 150 dollars of it early in March, 1825.

It was admitted the defendant left New Orleans for Alvarado, on the 1st of April, 1825, and did not return till February, 1826.

The defendant's promise is proved by Sprigg, and not denied by Lee. It is true, it is admitted that on the day on which the promise is stated to have been made, the defendant was not in the state. But the *alibi* proves only that there is an error in the time stated, which may well happen. Lee proves the payment made by the defendant before he set off for Alvarado, according to the promise stated by Sprigg; this payment in its amount, and the time of its being made, corresponds with Sprigg's statement. It is admitted it took place early in May, 1825, and the defendant went away on April 1, 1825; this was a payment before the defendant went to Alvarado.

Sprigg is a witness absolutely uninterested. A recovery on the present suit will render Lee liable to the action of the defendant. Lee informs us he has failed.

An error in a date does not necessarily deprive the deposition of a

witness of credit. It does not avoid a notarial act. 8 Toullier, 140 No. 83.

Lee deposes he neither recollects nor believes the account was presented by Sprigg to him. Let us give credit to this assertion, and it does not contradict the direct assertion of Sprigg. Lee may well have forgotten this circumstance, and having forgotten it, honestly swore he does not believe it exists.

Notwithstanding our reluctance to disregard the conclusion of inferior judges on matters of fact, we think, in the present case, the error is too evident not to be corrected.

The question of law raised on the want of consideration in the promise, must be determined in favor of the defendant. The debt of another is a sufficient consideration to support a contract of surety or a promise to pay it. *Novis. Recop.* 10.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled, and that there be judgment for the plaintiff for the sum of five hundred and twenty-eight dollars and seventy-one cents, with costs in both courts.

Hennen, for the plaintiff.

Grymes, for the defendant.

Mellon *v.* Louisiana State Insurance Company.
V, N. S. 563.

In case of a total loss, the assured must abandon within a reasonable time.

And whether the abandonment was made within a reasonable time, is a proper question to be submitted to the jury.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This is an action on a policy of insurance, in which the plaintiff alleges a loss of the merchandise insured, and abandonment made to the owners; and claims indemnity as for a total loss. The case was submitted to a jury in the court below, and comes up on a bill of exceptions taken by the counsel for the defendants, (who are here appellants,) to a charge of the judge *a quo*, to the jury in the course of the trial. This charge, as it appears in the record, was expressed in

the following terms:—"The judge charged the jury, that even if the jury was of opinion, there was no abandonment in August, 1825; yet if the jury were satisfied that no damage had occurred by the failure of the assured to abandon, within a reasonable time, such delay did not impair in any manner the rights of the assured." The counsel for the defendants objected to said charge, and prayed the court to charge the jury, that the abandonment, in all cases wherein any part of the thing insured is saved, or any rights or claims exist in relation to the property, must be made within a reasonable time. The judge refused to charge the jury, as requested, &c.

We are of opinion, that this charge is erroneous. In cases of insurance, where a part of the property insured is saved, but the loss on the whole is so considerable as to authorise the owners to treat it as total; such totality of loss, and consequent right in favor of the assured to recover full indemnity, can be effected only by abandonment on their part of all rights and claims to the underwriters, of any portion which may be saved. In the present case, the evidence shows that the goods insured were sold in Savannah, a port which the vessel was forced, by stress of weather, to put into; and was there found to be incapable of prosecuting her intended voyage, and no other conveyance being found for them to their place of destination, the commercial adventure of the assured was entirely frustrated, and perhaps, he had a right to abandon to the defendants, and claim indemnity as for a total loss; but without abandonment, which was necessary to vest rights in the insurers, such claim cannot be justified; for it would be most clearly unjust to suffer him to retain his right to the property insured, or its proceeds—and, at the same time, to recover its value from the underwriters. Assuming it as true, that the plaintiff was bound to abandon before he could legally claim indemnity from the defendants, as for a total loss, (and that such a measure was necessary to enable him to recover to the extent claimed in his petition, seems to be admitted, by an abandonment tendered sometime after information was received of the disaster which occurred to the vessel and cargo)—a question then arises as to the reasonableness of the time in which said abandonment was made; which might have been left to the jury under a proper charge from the judge as to the law on the subject. Delays, in giving notice of abandonment, which may be tolerated, must depend much on the peculiar circumstances of the cases in which they occur; but surely this notice ought to be given in a reasonable time in all cases wherein an abandonment is required. The judge *a quo*, therefore, erred in refusing to charge the jury, as requested by the counsel for the defendants. See Park on Insurance, 383 and 442; also Benecke, 336 and 420. As the charge which he gave may have influenced the jury in returning a verdict against the defendants for a total loss; and as that charge, in our opinion, is not in strict conformity with law: it is ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed and annulled; and it is further ordered, &c. that

the cause be remanded to said court to be tried *de novo*, the appellee to pay the costs of this appeal.

Watts and *Lobdell*, for the plaintiff.

Eustis, for the defendants.

Jewell *v.* Andrews. V, N. S. 566.

If there be a reconvention, and the sum so demanded added to that claimed by the plaintiffs, makes an aggregate of more than 300 dollars, this circumstance will not authorise an appeal.

OPPOSITION on an application for a *mandamus*.

PORTER, J., delivered the opinion of the court.

In this case the plaintiff has prayed a *mandamus* might be directed to the judge of the first district, to compel him to grant an appeal from a final judgment, rendered in his court.

The ground of this application is, that though the demand does not exceed 300 dollars, nor that of the defendant in reconvention, amount to that sum, yet, the two taken together do, and that so considered the case is one, of which the court can take cognisance.

The plaintiff has relied on authorities from Toullier and Sirey. But they cannot aid us much in construing our constitution. This point has already been expressly decided by this court, and we have discovered nothing in the books referred to, to induce us to change our opinion. 2 *N. S.* 314; 7 *Toullier, No.* 418; *Code annote par Sirey*, 453.

Let the rule be, therefore, discharged.

The United States *v.* Baulos's Executor. V, N. S. 567.

The United States have no privileged claim on the property of a firm of which their debtor is a member, till the debts of the firm be paid.

COURT of Probates of New Orleans.

MATHEWS, J. delivered the opinion of the court.

In this case, the attorney for the United States claims a privilege and preference in their favor, over other creditors of the testator, as created by an act of Congress, relative to debts due to the United States in cases of insolvency. See *Inger. Dig. p. 559, et seq.* That they are entitled to such privilege and preference in ordinary cases, cannot be doubted: but the present is not one of that nature. The facts of it, necessary to be noticed, show that Baulos, the testator, became the debtor of the United States for the debt now claimed, some years since; that he failed, or was insolvent; and that he afterwards entered into partnership with one Cavaroc, by which they acquired some property; but the portion falling to the share of the deceased, does not amount to more than will be sufficient to pay his part of the partnership debts.

The court of probates accorded a preference to the creditors of the partnership, over the claim of the United States, from which their attorney took the present appeal.

According to the principles assumed in the decision in the case of Purdy & Co. *v.* Hood & Co. *et al.*, the judgment of the court below is clearly correct. The property acquired by the partnership of Baulos & Cavaroc, does not belong to either of the partners separately; but remains a common stock, and pledged for the payment of the debts of the firm, in preference to any claims against the parties individually.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, with costs.

Moreau, for the appellee.

Smith, for the appellant.

Saul *v.* His Creditors. V, N. S. 569.

Subsequent statutes do not repeal previous ones by containing different provisions. They must be contrary.

The jurisprudence of Spain makes a part of the law of Louisiana.

The rules in relation to real and personal statutes, apply also to unwritten laws or customs.

Where the personal statute of the domicil is in opposition to a real statute of situation, the real statute will prevail.

Contracts are governed by the laws of the country where they are made, but they cannot be enforced to the injury of a state whose aid is required to carry them into effect.

Nor where they are in opposition to the positive laws of that state.

In the conflict of laws, where it is doubtful which should prevail, the court that decides should prefer the law of its own country to that of the stranger.

Personal statutes of the country where a contract is sought to be enforced, may sometimes control the personal statutes of the country where the contract was made.

The law relating to acquests and gains made during marriage, is a real, not a personal statute, and govern marriages made in other countries, where the parties reside in this, as to all property acquired after their removal.

But they yield to an *express* agreement made on entering into marriage in another country.

The contract of pledge of incorporeal things will not give a preference unless evidenced by an authentic act, or one *sous seing privé*, duly recorded, at a time not suspicious.

And this contract *sous seing privé*, though made long before insolvency, cannot be recorded, at a time when the debtor would be incapable of giving a preference by any act of his.

FIRST District.

PORTER, J., * delivered the opinion of the court.

The tableau of distribution filed by the syndics of the insolvent, was opposed in the court of the first instance; and the opposition being

* Although this decree only applies to cases arising under the Civil Code, prior to 1825, the Louisiana Code having left no room for doubt by its positive commands, yet the principles here settled are of perpetual utility and have been received with much deference by the other states. The original print of this decree was so full of errors as to obscure its meaning utterly: it is hoped the reader will draw a little more light now from its pages, especially from its citations. This case, in every way so memorable, is also to be noted as having called out the *Dissertations on the Contrariety of Laws*, of Samuel L. Livermore Esq., one of the counsel in the case, a champion of the losing side. These essays, relating chiefly to the distinction of real and personal statutes, display infinite research and acuteness, and may be said to leave the minds of all critics of our jurisprudence in other countries nearly balanced between two opinions in respect of Saul's case.

sustained, an appeal has been taken to this court, by the syndics, by the Bank of the United States, the Bank of Orleans, and the Bank of Louisiana.

The claims admitted by the judge *a quo*, and which are now contested here, are:—

First. That of the children of the insolvent, who claim as privileged creditors, for the amount inherited by them from their deceased mother.

Secondly. That of John Jacob Astor, of New York, who avers that he is a creditor of the insolvent for the sum of 64,000 dollars, and that he has a privilege on 751 shares of stock of the Bank of Orleans, which were pledged to him, and now make a part of the estate surrendered.

Thirdly. That of Alexander Brown & Sons, of Baltimore, who also assert a privilege on bank stock, which they state was pledged to them by the insolvent, for the security of a loan of 9,000 dollars, and upwards.

The different questions of law arising on these claims, have been argued with an ability worthy of their importance. Some of these questions are now presented for the first time for decision; and those which have been already before the court, and which have been acted upon, on other occasions, have been examined with so much care by the counsel, and have received such additional light from the laborious investigation bestowed on them, that they come upon our consideration with as much freshness, as if this were the only occasion on which our attention had been drawn to them.

We shall take them up in the order in which they have been already stated; and, first, the claim of the insolvent's children.

From the facts admitted by the parties, which admission makes the statement on this appeal, it appears: That Saul and his wife intermarried in the state of Virginia, on the 6th of February, 1794, their domicil being then in that state; that they remained there until the year 1804, when they removed to the present state of Louisiana; that they fixed their residence here, and continued this residence up to the year 1819, when the wife died; that after their removal from Virginia, and while living and having their domicil in this state, a

Mr. Livermore was a native of New England, resided some time in Baltimore, where, it is believed, he published his standard work on Agency, and finally settled in New Orleans, where the accuracy of his classical education, the subtlety of his logic, fortified by the most ample acquisitions of the lore of the continental jurists, made him, perhaps, the most accomplished civilian then living whose vernacular was the English language. He died in June 1833, in Alabama, while fleeing from the cholera at New Orleans, leaving an ample fortune at New Orleans. He will long be remembered in Louisiana for the personal traits shown in several memorable occurrences in the history of the country of the year 1812-13, for his clear foresight and judicious encouragement of the growth of the American fauxbourg of this city, and for the liberal, manly, thorough searching to the bottom, which he exemplified in his use of great principles.

large quantity of property was acquired by them, which at the death of the wife remained in the possession of her husband, the insolvent.

The children claim one-half of the property, as acquests and gains, made by their father and mother in this state. The appellants contend, that, as the marriage took place in the state of Virginia, by whose laws no community of acquests and gains is permitted, the whole of the property acquired here belongs to the husband.

This statement of the matter at issue shows, that the only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different states. Our former experience had taught us, that questions of this kind are the most embarrassing and difficult of decision, that can occupy the attention of those who preside in courts of justice. The argument of this case with the vast mass of learning which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt, as it would have appeared to our own understandings, had we been called on to decide, without the knowledge of what others had thought, and written upon it.

Until the discussion of this cause, it was generally understood by the bar and the bench in this state, that the question now agitated was well understood in our jurisprudence; and that from the period married persons from other states moved into this, the property acquired became common, and was to be equally divided between them at the dissolution of the marriage. We have not, therefore, been insensible to the argument so strongly pressed on us, that the question being already settled by the decisions of the tribunal of last resort in the state, the subject ought not to be opened again, and that the most important interests of society require, there should be a time when contested points of jurisprudence may be considered as at rest. But these considerations are not in this case of sufficient weight, to preclude a re-examination of the principles on which the doctrine already stated has been established. A sufficient period has not elapsed to enable it to derive much authority from the acquiescence of others. The decision of the court can not be supposed to have influenced parties entering into the marriage contract, or greatly to have affected any important interests in society. It applied only to married persons emigrating from other states, whose exertions or industry can not be supposed to have been much changed, by the anticipation of the property going in one direction or the other; whose habits were formed before they came here, and no doubt remained the same after their immigration as before. We shall, therefore, proceed to the examination of the question, as if it were now presented for the first time, and we trust, without any bias which might be supposed to exist on our minds, from the opinions we have already expressed.

The investigation we are about to make, will be best conducted by first examining our own statutes.

The old Civil Code provided: that every marriage contracted

within this state, superinduces, of right, partnership or community of acquests and gains. Civil Code, 336. Art. 63.

Our Revised Code repeats this provision, and adds another: that a marriage contracted out of this state between persons who afterwards come to live here, is also subject to the community of acquests, with respect to such property as is acquired after their arrival. Code, 2370.

If the acquests and gains, in respect to which the present suit exists, had been made under the dominion of the law last cited, there would be an end to any dispute about their distribution; but the marriage of the insolvent and his wife was dissolved by the death of the latter, before that law was enacted.

It has been contended, that, as the article first cited provides for a community of acquests and gains in all marriages contracted within the territory, it is an evidence that the legislature did not intend there should be a community in marriages made without: *inclusio unius, est exclusio alterius.*

It would be giving too much weight to the argument *contrario sensu*, to adopt this construction. If the subject were one on which there had existed no previous legislation, it would certainly be fair to contend, that as the law maker has affirmatively declared, that particular cases not enumerated should produce certain effects, this affirmative included the negative, that other cases not enumerated should not produce these effects; though even then, this reasoning, which is founded on presumption, might yield to other circumstances, by which that presumption could be repelled. But when there already exists positive legislation on the same subject matter, providing for the very case which it is presumed is excluded, the argument almost wholly loses its weight. The law must then be interpreted by a well known rule of jurisprudence, that an intention to repeal laws can never be supposed: that subsequent statutes do not abrogate former ones by containing different provisions on the same subject; that they must be contrary in order to produce such effect. This rule, which is true in relation to all laws, is more particularly applicable to our Codes, which were lony intended to lay down general principles, and provide for cases of the most common occurrence. If, then, the provisions in our Code can not be considered to have repealed the former law, no argument can be drawn from them as to the intention of the legislature to do so, or as to their opinion on this subject. It is more than probable their thoughts were not turned to a case which is not of frequent occurrence. If they had intended to act on it, as the matter was to say the least doubtful, they certainly would not have increased these doubts by leaving their will to be inferred from an affirmative regulation on the same subject, but having relation to a different state of things. We are bound to believe that they would have legislated directly on it, and have positively declared, as they have since done, what the rule should be, when people married in another country, and removed into this.

It being clear, then, that our own statutes furnish no guide for the decision of this question, recourse must be had to the former laws of the country.

The positive regulations of Spain on this subject, are contained in two laws; one of the *Fuero Real*, and the other of the *Partidas*.

That part of the law of the Partidas which directly applies to the case before the court, is in the following words:—*E dezimos, que el pleyto que ellos pusieron entre si, deve vuler en la manera que se avinieron ante que casassen, o quando casaron; e non deve ser embargado por la costumbre contraria de aquella tierra do fuesen a morar. Esse mismo seria, maguer ellos non pusiessen pleyto entre si; ca la costumbre de aquella tierra do fizieron el casamiento deve valer, quanto en las dotes, e en las arras, e en las ganancias que fizieron; e non la de aquel lugar do se cambiaron. P. 4, tit. 11, ley 23.* "And we say, that the agreement they had made before or at the time of their marriage, ought to have its effect in the manner they may have stipulated, and that it will not be avoided by the custom of the place to which they may have removed. And so we say it would be, if they had not entered into any agreement; for the custom of the country where they contracted the marriage, ought to have its effect as it regards the dowry, the *arras*, and the gains they may have made; and not that of the place to which they may have removed."

Some verbal criticism has been exercised on this law. It is contended by one of the parties, that it only intended to provide for the gains made before the removal of the married couple; or, at all events that the words used leave the sense doubtful. By the other, that it regulates all, whether made before or after they left the country in which the marriage took place. The expressions used, though not free from all ambiguity, as the appellants have argued, we think ought to receive the construction for which they contend. The law was so understood by the commentators of that day, and the preceding parts of it, compared with the clause in which the obscurity is said to exist, serve to support this interpretation.

If these provisions in the *Partidas* stood alone, they would admit of a more favorable construction in support of the ground assumed by the counsel for the syndics, than they can receive, when taken in connection with the law of the *Fuero Real*, which is in the following words:—

Toda cosa que el marido y muger ganaren o compraren, estando de consuno, hayanlo ambos por medio, &c. Novisima Recop. lib. 10, tit. 4, ley 1.

"Every thing which the husband and wife may acquire while together, shall be equally divided between them."

The Codes in which these laws are found, were composed under the authority of Ferdinand the Third, and his son Alphonso the Wise, nearly about the same time. The *Fuero Real* was published in the year 1255. The *Partidas* although completed in 1260, were not pro-

mulgated until nearly a century afterwards. By the Spanish writers, the former is considered, with respect to the latter, what the Institutes of Justinian are to the Pandects; and it has been admitted, that they may mutually aid in the interpretation of each other.

We have then two statutes presented for construction, one of which, not in terms the most clear, directs that the custom of the country where parties contract marriage should regulate their rights, in respect to acquests and gains; and another which declares, that every thing that husband and wife may gain or purchase, shall be equally divided between them.

If the question, as to the true interpretation of these laws, now arose for the first time, we should hesitate what construction to put on them. Either taken singly, and according to the letter, goes the whole length for which each of the parties before us contends; but before examining them, to ascertain what conclusion we should come to, if left to our judgment unaided by the opinions of others, it is proper we should endeavor to learn what construction was put on them, in the country where they were made. On whatever side the weight of authority should be found to preponderate, we may certainly adopt that side. They who have lived under these laws for nearly five hundred years before they passed to us, must, we feel, have more knowledge of the intention and meaning of their own legislation, than we, at this remote period of time, who have come to a knowledge of them as it were but of yesterday, can possibly possess.

Nothing can be more satisfactorily shown, than the opinion of the commentators on the statutes of Spain, in relation to this particular subject. From the time Gregorio Lopez published his work on the Partidas, in the year 1555, down to Febrero, in the year 1781, the writings of no jurist of that country who treats of this matter have been produced to us, that does not declare, that the law of the Partidas, already cited, must be limited to property acquired in the place where the marriage is contracted, and that it does not extend to acquisitions made in another country, to which the parties may have removed, where a different rule should prevail. In the long list of writers, who have been cited in support of this doctrine, are to be found some of the most illustrious of whom the middle ages could boast, *James of Arena*, *Gulielmus de Cuneo*, *Dynus*, *Raynaldus Jean Favre*, *Baldus*, *Alciat*, and *Ancharanus*, *Gregorio Lopez*, on the 4 *Partidas*, *tit.* 11, *law* 24; *Matienzo Commentario*, *lib.* 5, *tit.* 9, *nos.* 73 *et* 74; *Febrero*, *P.* 2, *lib.* 1, *cap.* 4, *sect.* 2, *no.* 62.

Trying the question, therefore, by authority, no doubt can exist, on which side it preponderates, in the country where the statute was passed. Admitting then for a moment, that the letter of the law of the Partidas was violated, by the construction given to it by the commentators, that violation acquiesced in for centuries, by lawyers, courts, and the sovereign authority of the country, makes as much a part of the law of Spain at this day, as if the statute had been modi-

fied by the power in the state in which the right of legislation was vested. In looking into the laws of any country, we stop at the threshold, if we look no further than their statutes; and what we should see there would, in most instances, only tend to mislead. In every nation that has advanced a few steps beyond the first organisation of political society, and that has made any progress in civilisation, a more extensive and equally important part of the rules which govern men, is derived from what is called, in certain countries, common law, and here, jurisprudence.

This jurisprudence, or common law, in some nations, is found in the decrees of their courts; in others, it is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means:—that of reason alone. After a long series of years, it is sometimes difficult to say, whether these opinions and judgments were originally the effect of principles, previously existing in society, or whether they were the cause of the doctrines, which all men at last recognise. But whether the one, or the other, when acquiesced in for ages, their force and effect can not be distinguished from statutory law. No civilised nation has been without such a system. None, it is believed, can do without it; and every attempt to expel it, only causes it to return with increased strength on those, who are so sanguine as to think it may be dispensed with. *Duponceau* on Jurisdiction, 105.

Spain, that was among the first of the European nations to reduce their laws into codes, and that carried that mode of legislation farther than any other people, early felt the necessity of a jurisprudence, which would supply the defects, and soften the asperities of her statutes. The opinions of her jurisconsults seem to have obtained an authority with her, of which the history of no other country offers an example. So early as the fifteenth century, a law was passed, regulating the authority which belonged to the opinions of *Bartolus*, *Baldus*, *Juan Andrea*, and *Alciat*. That law was, it is true, afterwards repealed by the first of *Toro*, and directions given that in case of doubt as to the true interpretation of the statutes, recourse should be had to the sovereign himself. What was the practical operation of this last statute, our researches do not enable us positively to state. It does not, however, seem to have made much change in the practice of her courts; for in the year 1713, we find an *auto accordado* in respect to the laws that should be followed in the decision of causes; in which it is stated, as a great inconvenience, that the tribunals of justice had resorted to foreign books and authors, to the depreciation of their own jurists; who, with great knowledge, had explained, and interpreted their laws, ordinances, and customs. But admitting that after the promulgation of the law of Toro, the opinions of these jurists had not the weight they before received, and that in all unsettled cases recourse was had to the sovereign himself:—when

we find that nearly four hundred years after, the writers on the laws of Spain refer to no decision of their king and council on this point, express no doubt about it, and quote the opinions of jurists who wrote nearly the same length of time before them, what conclusion can we come to, but that no doubt did exist on the subject in Spain. That the whole nation acquiesced in the opinions of those who had early interpreted their statutes, and that the tacit consent of the sovereign himself, must be presumed given to a construction, which he had the power to change, but in which it is not shown he made any alteration. *Novisima Recop. lib.* 3, *tit.* 2, *leyes* 3 *et* 11.

It is most clear, then, that this interpretation, which limits the law of the *Partidas*, to the gains made in the country where the marriage was contracted, and excludes from its operation, property acquired after a change of residence, comes to us recommended and fortified by every sanction that can give it value in the minds of those who sit in judgment; and whose duty it is, to pronounce what the law is, not what it ought to be.

The appellants however contend, that, although such may be the construction given to the statute in Spain, that construction is not binding on the court, because this is a question of jurisprudence not peculiar to any distinct nation, but one touching the comity of nations, and embracing doctrines of international law, on which the opinions of writers not living in Spain, are entitled to equal weight with those who professedly treat of her laws.

The strength of the plaintiff's case rests mainly on this proposition, and it is proper to examine it with the attention which its importance in the cause requires.

But though of importance, it is not of any difficulty. By the comity of nations, a rule does certainly exist, that contracts made in other countries, shall be enforced according to the principles of law which govern the contract in the place where it is made. But it also makes a part of the rule, that these contracts should not be enforced to the injury of the state whose aid is required to carry them into effect. It is a corollary flowing from the principle last stated, that where the positive laws of any state prohibit particular contracts from having effect, according to the rules of the country where they are made, the former should control; because that prohibition is supposed to be founded on some reason of utility, or policy, advantageous to the country that passes it; which utility, or policy, would be defeated, if foreign laws were permitted to have a superior effect. On the very subject matter now before us, the writers who treat of it, although disputing about almost every thing else, agree in stating that a real statute, that is, one which regulates property within the limits of the state where it is in force, controls personal ones, which follow a man wherever he goes:—indeed, it has been expressly, and with great propriety, admitted in argument, that where the personal statute of the domicil is in opposition to a real statute of situation, the real statute will prevail. *Boullenois, Disc. Prelim. p.* 21;

Ibid. des Demis. Quest. 6, 163; *Bouhier, sur la Coutume du Duche de Bourgoyne, cap.* 23, 461; *Rodenburgh, de Statutor. diversit. tit.* 2, *cap.* 5, *No.* 6.

If this be true, the question whether the opinions of foreign jurists shall control those of the country where the statute is passed, is at once settled. If the right of a nation to pass the statute, which will affect a contract made in another country, be admitted, the right cannot be contested to her to say, whether she has done so or not. She surely is the best and safest expounder of her own laws. And we repeat here, what we said a few days since, on nearly the highest authority to which we could refer: "That no court on earth, that professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or France, or any other nation, had misunderstood their own statutes, and therefore, erect itself into a tribunal, by which that misunderstanding was to be corrected." 10 Wheaton, 159.

And if we did recur to the jurists of France and Holland for information, what would we get in place of the well established rules in Spain? Much to confuse, and little to enlighten us. We should find great learning and ingenuity exercised by some to show, that the law which regulates the rights of property among married persons, is a personal one, which follows the parties wherever they go. By others, that it is real, and limited to the country by which it is made. But not one of them denies the power in a nation to pass a law such as has been lately enacted by the state of Louisiana, that a married couple moving into it from another state, shall be governed by her laws as to their future acquisitions. None of them professes to comment on the laws of Spain, which her jurists say, have the same effect with our late statute. They are not even mentioned by them. How wholly unsatisfactory, therefore, any general reasoning must be, on different customs and usages, to prove that the law of the *Fuero* is a personal, and not a real statute, we need not say.

With this view of the subject, we might conclude. But as it is always satisfactory for this court to feel, that the authority which governs it, is founded in truth, we shall proceed to examine the grounds on which the opinions of the Spanish jurists have been so strongly assailed. In doing so, we are led into an examination of the doctrine of real and personal statutes, as it is called by the continental writers of Europe; a subject, the most intricate and perplexed of any that has occupied the attention of lawyers and courts: one on which scarcely any two writers are found entirely to agree, and on which, it is rare to find one consistent with himself throughout. We know of no matter in jurisprudence so unsettled, or none that should more teach men distrust of their own opinions, and charity towards those of others.

Holland and France appear to be the countries where the greatest number of these questions have arisen, and where the subject has excited most attention. The doctrine which they denominate that of

real and personal statutes, is not, as it might, from the terms used, be supposed, confined to written and positive law; but is applied, also, to unwritten laws or customs, by which the state or condition of man is regulated—his contracts governed, or his property distributed at his death. It professes to furnish the rules which are to govern men in civil matters, when they pass from one country to another, and to distinguish and decide in all cases, where the law of domicil and that of origin differ; where the rules of the place of contract and its execution conflict; where the countries in which a marriage is contracted, and dissolved, have different regulations; or where, on the decease of the owner, his property is situated in several places, having different rules as to its distribution.

According to the jurists of those countries, a personal statute is that which follows, and governs the party subject to it, wherever he goes.

The real statute controls things, and does not extend beyond the limits of the country from which it derives its authority.

The personal statute of one country controls the personal statute of another country, into which a party once governed by the former, or who may contract under it, should remove.

But it is subject to a real statute of the place, where the person subject to the personal should fix himself, or where the property on which the contest arises may be situated.

So far the rules are plain and intelligible, but the moment we attempt to discover from these writers, what statutes are real, and what are personal, the most extraordinary confusion is presented. Their definitions often differ, and when they agree on their definitions, they dispute as to their application.

Bartolus, who was one of the first by whom this subject was examined, and the most distinguished jurist of his day, established as a rule, that whenever the statute commenced by treating of persons, it was a personal one; but if it began by disposing of things, it was real. So that if a law, as the counsel for the appellants has stated, was written thus: "the estate of the deceased shall be inherited by the eldest son," the statute was real; but if it said, "the eldest son shall inherit the estate," it was personal.

This distinction, though purely verbal, and most unsatisfactory, was followed for a long time, and sanctioned by many whose names are illustrious in the annals of jurisprudence, but it was ultimately discarded by all. D'Argentre, who rejected this rule, to real and personal statutes added a third, which he called mixed. The real statute, according to this writer, is that which treats of immovables. *In quo de rebus soli, id est immobilibus agitur*, and the personal that which concerns the person abstracted from things. *Statutum personale est illud quod afficit personam universaliter, abstracte ab omni materia reali.* The mixed he states to be one which concerns both persons and things.

This definition by D'Argentre of a personal statute has been adopt-

ed by every writer who has treated of this matter. A long list of them, amounting to twenty-five, is given by Froland in his *Memoires concernans la qualité des statuts*, among which are found *Burgundas, Rodenburg, Stockmans, Voet and Dumoulin. Froland, Memoires concernans la qualité de statuts, chap. 5, no 1.*

But the definition which he has given of a real statute, does not seem to have been so generally adopted: it was, however, followed by *Burgundas, Rodenburg and Stockmans.*

Boullenois, who is one of the latest writers, attacks the definitions given by D'Argentre, and as he supposes, refutes them; he adds others which appear to be as little satisfactory, as those he rejects. He divides personal statutes, into personal particular, and personal universal; personal particular, he sub-divides again, into pure personal, and personal real. *Boullenois, Traité de la Personalite et de la Realit. des lois, tit. 1, cap. 2, obs. 4.*

Voet has two definitions, one that a real statute is that which affects principally things, though it also relates to persons, and the other, that a personal statute is that which affects principally persons, although it treats also of things.

It would be a painful and a useless task, to follow these authors through all their refinements. President Bouhier, who wrote about the same time as Boullenois, and who has treated the subject as extensively as any other writer, after quoting the definitions just given and others, says, that they are all defective, and that he cannot venture on any, until the world are more agreed what statutes are real, and what are personal. While they remain so uncertain, he thinks the best way is to follow the second definition of Voet, which is: "that a real statute is that which does not extend beyond the territory within which it is passed, and a personal, is that which does." *Bouhier sur les Coutumes de Bourgogne, chap. 23, no. 29.*

This last mode of distinguishing statutes, which teaches us what effect a statute should have, by directing us to inquire what effect it has, is quite as unsatisfactory as the rule given by Bartolus, who judged of it by the words with which it commenced.

The rules given by Chancellor D'Aguesseau, are perhaps preferable to any other. That, says he, "which truly characterises a real statute, and essentially distinguishes it from a personal one, is not that it should be relative to certain personal circumstances, or certain personal events; otherwise we should be obliged to say, that the statutes which relate to the *paternal power, the right of wardship, the tenancy by courtesy, (droit de viduite,) the prohibition of married persons to confer advantages on each other*, are personal statutes, and yet it is clear, in our jurisprudence, that they are considered as real statutes, the execution of which is regulated, not by the place of domicil, but by that where the property is situated."

"The true principle in this matter is, to examine if the statute has property directly for its object, *or its destination to certain persons, or its preservation in families*, so that it is not the interest of the

person whose rights or acts are examined, but the interest of others to whom it is intended to assure the property, or the real rights which were the cause of the law. Or if, on the contrary, all the attention of the law is directed towards the person, to provide in general for his qualifications, or his general and absolute capacity; as when it relates to the qualities of major, or minor, of father or of son, legitimate or illegitimate, ability or inability to contract, by reason of personal causes."

In the first hypothesis the statute is real, in the second it is personal, as is well explained in these words of D'Argentre: "*Cum statutum non simpliciter inhabilitat, sed ratione fundi aut juris realis alterum respicientis extra personas contrahentes, toties hanc inhabilitatem non egredi locum statuti.*" *Œuvres D'Aguesseau*, vol. 4, 669, *cinquante-quatrieme plaidoyer.*

This definition is, we think, better than any of the rest: though even in the application of it to some cases, difficulty would exist. If the subject had been susceptible of clear and positive rules, we may safely believe this illustrious man would not have left it in doubt, for if any thing be more remarkable in him than his genius and his knowledge, it is the extraordinary fulness and clearness with which he expresses himself on all questions of jurisprudence. When he, therefore, and so many other men, of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far. To define and fix that, which can not in the nature of things be defined and fixed. They seem to have forgotton, that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be uncertain. That it must necessarily depend on a variety of circumstances, which can not be reduced within any certain rule. That no nation will suffer the laws of another to interfere with her own, to the injury of her citizens: that whether they do or not, must depend on the condition of the country in which the foreign law is sought to be enforced—the particular nature of her legislation—her policy—and the character of her institutions. That in the conflict of laws, it must be often a matter of doubt which should prevail, and that whenever that doubt does exist, the court which decides, will prefer the law of its own country, to that of the stranger.

These principles may be in part illustrated by one or two examples, that we presume will receive general assent.

The writers on this subject, with scarcely any exception, agree, that the laws or statutes which regulate minority and majority, and those which fix the state and condition of men, are personal statutes, and follow and govern him, in every country.

Now suppose the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and had lived, previous to his coming here, placing it at twenty-one, no objection

could be perhaps made to the rule just stated, and it may be, and we believe, would be true, that a contract made here at any time between the two periods already mentioned, would bind him.

But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that at the age of twenty-four he came into this state, and entered into contracts; would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge? and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent their enforcing it, though the agreement was binding by those of their own state?* Most assuredly we would not. Baldwin *v.* Gray, 4 *N. S.* 193.

Take another case. By the laws of this country, slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts;—would their courts sustain the argument that his state or condition was fixed by the laws of his domicil of origin? We know they would not.

These examples might be multiplied, but they are sufficient to explain the ideas of this court, that it is almost impossible to lay down any general rule on the subject; and that even the personal statutes of one country may be controlled by those of another.

* Of these doctrines, Mr. Justice Story in his Conflict of Laws, chap. 4, section 76, says: "The case first put seems founded upon a principle entirely repugnant to that upon which the second rests. In the former, the law of the domicil of origin is allowed to prevail; in the latter that of the domicil of the contract.—The difficulty is in seeing, how a court, without such positive legislation, could arrive at both conclusions. General reasoning would lead us to the opinion that both cases ought to be decided the same way; that is, either by the law of the domicil of origin, or by that of the domicil of the contract." See Barrera *v.* Alpuente, 6 *N. S.* 69.

The original of the doctrine here held in Saul *v.* His Creditors, is found in PORTER, J.'s decree, in Baldwin *v.* Gray, 4 *N. S.* 193, (referred to in the text,) and it is justified solely on the ground of the expediency of yielding to the paramount obligation of the *lex loci contractûs*. This seems to have been Judge Porter's uniform opinion, and with this key a perfect harmony is established between his two supposed cases:—a New York major of 23, contracts in Spain, his contract does not bind him; a Spanish minor of 23, contracts in New York, his contract binds him; in each, the *locus contractûs* furnishes the rule. It is admitted that in 3 *Martin*, 70, (the elopement case,) a different doctrine was thrown out, and in Depau *v.* Humphreys, 8 *N. S.* 30, MARTIN, J., enumerates among the deplorable consequences of a principle which he is combating, that by analogy, "the minor who cannot bind himself at home, might do so, if he engages to pay in another country." This latter, however, is not precisely the case of a minor in one country transferring himself to another, but only of a minor attempting to avail himself constructively of the law *destinatæ solutionis*, so as to evade the disability imposed on him by his own country.

From the various definitions already cited, it may be easily supposed, that a vast diversity of opinion existed in their application to the contract of marriage. Both in France and Holland, it has been a subject of great contention. The courts and parliaments, of different provinces, have decided it differently; some of them considering the law which regulates the rights of parties in the conntry where the marriage takes place as real: some as personal.

An examination of the different treatises on this subject has convinced us, that the greater number of the lawyers of those countries, are of opinion, that in settling the rights of husband and wife, on the dissolution of the marriage, to the property acquired, the law of the place where it was contracted, and not that where it was dissolved, must be the guide. Such was the jurisprudence of the parliament of Paris. It was the opinion of Dumoulin, of Boullenois, of Rodenburgh, of Le Brun, of Froland, of Bonhier, of Stockmans, of Pothier, and it is that of Merlin. On the other side are found, D'Argentre, Cravette, Everard, Vandermeulen, the parliament of Rouen, the Supreme Court of Brabant and that of Metz.

But it is evident, the opinions of the larger part of those who think that on the dissolution of the marriage, the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by them, is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

It is particularly worthy of remark, that Dumoulin, the founder of this system, was of opinion, that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments: and it appears supported by quotations which he makes from his works. Boullenois, *Traité de Personalite et de Realite des Lois.* Obs. 29, p. 740, 757, 758.

Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract, treat the idea of a tacit agreement as one which exists in the imagination alone. But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape, but to our judgment it is quite unsatisfactory.

Admitting it for a moment to be true, that when parties married there was a tacit contract between them to the effect that their rights to property subsequently acquired, should be governed by the laws of the country where the marriage took place: that tacit agreement would still be controlled by the positive laws of any country into

which they might remove. This is admitted by Dumoulin himself, who, after treating of the tacit agreement, and stating that the statute is not legal but conventional, *Statutarium proprie non est nec legale, sed conventitium*, adds, such tacit convention cannot have this effect in another place, where there exists a contrary statute, which is absolute and prohibitive, *alias si statutum esset absolutum et prohibitorium, non obstantibus pactis factis in contrarium: tunc non haberet locum ultra fines sui territorii.* Dumoulin on the first book of the Code, *verbo Conc. de stat. et consuet loc. Froland, Memoires sur les Statuts*, chap. 4, 63.

If such be the consequence where the statute is prohibitive, we do not see why the same result should not follow from a real statute, which regulates things within the limits of the country where it is in force. The reason for both is the same, namely, that the laws of the country where the contract is sought to be enforced, are opposed to it. Why the one should have effect, and the other should not, we profess to be unable to distinguish. It may be a question whether the statute is real or not, but the moment it is admitted to be so, it regulates all property acquired within its authority; then, according to the principles of Dumoulin, the tacit agreement can no more control it, than it could the law which positively forbade such tacit agreement from having effect. So that even admitting this tacit agreement, we are brought back to the point from which we started; that is, whether the law regulating the right of husband and wife, be real, or personal?

But without agreeing with those, who have treated the idea of Dumoulin as one purely of the imagination, we think that he gives to this tacit consent a much more extended effect than it is entitled to. In supposing that when parties marry, they intend the laws of the place where the contract is made, should govern them wherever they go, he begs the question; and the first thing to be settled is, whether these laws do govern them wherever they go.

We are now treating, let it be remembered, of a case such as that before us, where there is no express contract, and the argument is, that the parties not having entered into an express agreement, the presumption must be, they intended their rights to property should be governed by the laws of the country where they married. This is admitted. But then this presumption, as to their agreement, cannot be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the state where they were passed:—then it cannot be true to suppose, the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted; if it was real, and not personal, the tacit consent of the parties cannot turn it into a personal statute. They have not said so; and they are presumed to have contracted in relation to the law, such as it was, to have known its limitations, as well as its nature,

and to have had the one as much in view as the other. If the law of Virginia should have been, that for twenty years, the acquisitions made by the parties belonged to one of them, and they married without an express stipulation to the contrary, they would be presumed to have contracted in reference to this limitation of time. If, on the contrary, the law is limited as to place, the tacit agreement which is founded on a supposed consent that the law should govern them, must be considered to have that limitation in view. In one word, the parties are presumed to have agreed, that the law should bind them as far as that law extended, but no further. So that this doctrine brings us back again to the inquiry, was the statute real or personal? Did it extend beyond the limits of the country where the marriage took place, or did it not?—Whichever it may be found to be, the parties must be supposed to have contracted. In the absence of any thing expressed to the contrary, we can not presume they intended to enlarge or restrain the operation of the law.

The most familiar way of treating this idea, of tacit contracts, being made in relation to the laws of the country where they are entered into, is to say, that the agreement is to be construed the same way, as if those laws were inserted in the contract. Now, supposing parties to marry in Louisiana, and that our statute, providing for the community of acquests and gains, is real and not personal; that it divides the property, acquired while in this state, equally between the husband and wife, but does not regulate that which they gain in another country to which they remove; the insertion of this law in a contract, would be nothing more than a declaration, that while residing within this state, there should be a community of acquests and gains. An agreement, such as this, could not have the same force as an express one, by which the parties declared, there should be a community of acquests and gains, wherever they went: for the one has no limitation as to place, and the other has. The maxim, therefore, which was so much pressed on us in argument, *taciti et expressi eadem vis*, is only true, where the law, to which the tacit agreement refers, contains the same provisions as the written contract.

It was evidently on this distinction the cases of Murphy *v.* Murphy, 5 *Mart.* 83; and Gale *v.* Davis' Heirs, 4 *Mart.* 645, were differently decided in this court. In the former, there was an express contract, that there should be a community of acquests and gains between the parties, even though they should reside in countries where different laws might prevail. In the latter, there was no express agreement; and the parties were not presumed to have made a tacit one, contrary to the law of the place where they married. They were not supposed to have agreed, that a real statute, which governed them only while there, was to follow them as a personal one, and regulate their property in another state. If principles so plain, required any authority, we would find it in the very author, on whom the appellants principally rely. Dumoulin, after stating

that the tacit contract will be controlled by a law that is contrary to it, in the country where the marriage is dissolved, adds: that it will be different, where the agreement is express. *Nisi expresse de tali lucro conventium fuisset, quia pactio bene extenditur ubique, sed non statutum mere. Froland, Memoires sur les Statuts, cap. 4, p. 63.*

Having thus stated the reasons why this doctrine of a tacit contract, cannot be admitted by us to the extent pressed by the counsel, it only remains for us to examine, whether the law of the *Fuero* was a real, or personal statute. We consider it real. It appears to us to relate to things, more than to persons; to have, in the language of D'Aguesseau, the destination of property to certain persons, and its preservation in families, in view. It gives to the wife and her heirs the one half of that which would otherwise belong to the husband. Boullenois, who rejects Dumoulin's idea of a tacit agreement, says the statute which regulates the community is a personal one, because it fixes the state and condition of the spouses; and he goes so far as to declare, that if his adversaries will not allow this doctrine to be correct, then the statute is real, for on no other ground can it be considered personal. We think the state and condition of both husband and wife are fixed by the marriage independently of this law in relation to every thing but property, and as it regulates property alone, it is not a personal statute. *Boullenois, Traité des Statuts, cap. 5, obs. 29, p. 751; cap. 2, obs. 580.*

Upon reason, therefore, but still more clearly on authority, we think the appellants have failed to make out their case. We know of no question better settled in Spanish jurisprudence, and what is settled there can not be considered as unsettled here. The jurisprudence of Spain came to us with her laws. We have no more power to reject the one, than the other. The people of Louisiana have the same right to have their cases decided by that jurisprudence, as the subjects of Spain have, except so far as the genius of our government, or our positive legislation, has changed it. How the question would be decided in that country, if an attempt were made there on the authority of French and Dutch courts, and lawyers, to make them abandon a road in which they have been travelling for nearly three hundred years, we need not say. The question is sufficiently answered by the *auto* already cited: in which the adoption of the opinions of foreign jurists, in opposition to those of Spain, is reprobated, and forbidden.

We conclude, therefore, that a community of acquests and gains did exist between the insolvent, and the mother of the appellees, from the time of their removal into this state; and that the court below committed no error, in placing them on the bilan as privileged creditors, for the amount of those acquests which remained in their father's possession, at the dissolution of the marriage.

The next claim which is contested, is that of Astor, who sets up a privilege on certain shares of bank stock, which he avers were pledged to him for the security of a loan of money.

[Saul v. His Creditors.]

The pleadings in this case need not be set out. The question presented by them is, whether the plaintiff has a right to be paid in preference to the other creditors, out of the proceeds of seven hundred and fifty-one shares of the capital stock of the Bank of Orleans, pledged to him by an act passed before a notary public, in the city of New York, in security for the sum of sixty-four thousand dollars lent to the insolvent and Benjamin Morgan.

The instrument of writing, on which this preference is claimed, was executed in New York, on the——of November, 1822, and is in form a *sous seing privé*. To the execution of it there is one witness, George D. Cooper, who, we presume, is the same person who afterwards received an acknowledgment of it as notary public.

This acknowledgment is in the following words:—"State and city of New York, ss. on the twentieth day of November, 1822, before me George D. Cooper, notary public for the city and state of New York, duly commissioned and sworn, dwelling in the city of New York, personally appeared Joseph Saul, and executed the within instrument of writing as his act and deed, and as the act and deed of the within named Benjamin Morgan by virtue of a power of substitution from C. Price and Morgan, attorneys in fact for the said Benjamin Morgan."

Our Code provides, "That the property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them rateably, unless there exists among the creditors some lawful cause of preference." Civil Code, 468, art. 67.

"These lawful causes of preference result from privileges and mortgages." Civil Code, *Ibid.*

"Among the privileges on movables, the debt on the pledge which is in the creditor's possession, is placed in the third rank." Civil Code, 469, art. 74, No. 3.

Our inquiry then is, has that "lawful cause of preference been established here?"

The authority already quoted, has provided for the manner in which that arising from a pledge shall be created.

"The pledge is a contract by which a debtor gives something to his creditor, as a security for his debt." Civil Code, 446, art. 1.

"The power invests the creditor with the right of causing his debt to be satisfied out of the movable thing which is given as a pledge, by privilege and preference to the other creditors." *Ibid.* 446, art. 5.

"This privilege shall take place against third persons only, in case the power is proved by an act made either in public form, or under private signature, provided that, in this last case, it should be duly registered in the office of a notary public, at a time not suspicious." *Ibid.* art. 6.

"The privilege mentioned in the preceding article is established, with respect to incorporeal movable things, as movable credits only by an authentic act, or by an act under private signature received as

aforesaid, and notified to the debtor of the credits given in pledge." *Ibid.* art. 7.

It is contended on the part of the appellees, that the third persons, mentioned in the provisions of our Code, are not the chirographic creditors of the insolvent.

The appellants urge, that by the French text of the law, all creditors are embraced. The language used in it is, "*Ce privilege n'aura lieu q'autant que le nantissement est prouve, &c.* The expression, third persons, not being contained in this enactment, they contend any one may object to the want of the formalities by which the privilege is established.

At the period at which our late Civil Code was adopted, the laws of this country were passed in both the French and English languages, and the act of the legislature which gave that work the force of a law, directed, that in case any obscurity or ambiguity should be found in its provisions, the English and French texts should be consulted, and mutually serve to the interpretation of each other.—Acts of 1808, cap. 29, sect. 5.

In applying the rule of construction, here established, to the cases contemplated by it, this court has held, that when ever the expressions used in the different texts, could be reconciled and made to harmonise with each other, it was our duty so to interpret them. But that where they could not, such construction should be adopted, as would give effect to both. 2 *N. S.* 585.

Thus in the case of Touro *v.* Cushing, where the texts presented two distinct ideas to the mind, we thought a compliance with either sufficient, on the part of him who claimed the benefit of the law; otherwise, as was there said, the statute would be a *decoy*, instead of a *beacon*. 1 *N. S.* 425.

And in that of Chretien *v.* Theard, when the difficulty arose on an enactment which made *adonne au vol* in the French text, a ground of *redhibition*, and in the English, restricted it to *robbery;* we held that it was our duty to take the language in its most enlarged sense; because, in doing so, we gave full effect to both clauses. 2 *N. S.* 582.

So, here, if the expressions "shall take place against third persons," used in the English part of the law, limited the right of opposition to a particular class of creditors; the language in the French, which declared generally, that it should not take place, (*n'aura lieu*) would control them; because, by this interpretation we give effect to both.

But there is, in truth, no difference in the sense conveyed by the two texts. The words, *third persons*, in the English, must mean all the creditors, or they mean no person. In relation to a sale of immovable property, these words have been construed to mean, those who had obtained a privilege or mortgage on it; but in respect to movables given in pledge, a delivery is the very essence of the contract, and two persons cannot acquire a privilege on them. If, therefore, chirographic creditors could not object to the want of the for-

malities necessary to give a preference against third persons, the whole provision would be without effect.

The appellants contend, that the instrument by which this pledge was created, is not an authentic act; that it has no more authenticity here than a *sous seing privé*, and that it was recorded at a suspicious time.

It becomes, therefore, necessary to inquire what kind of act is meant by the Code. In the sixth article of the title, in relation to pledge, (which has been already cited) it is required, that the pledge should be proved by an act in public form. This is rendered in the French text, by the words *acte authentique*. In the seventh, which relates to the species of pledge on which this contract has arisen, the English part of the law declares, it must be shown by an *authentic act*. This is given in the French, by the expression, *acte public*.

In regard to the alleged inconsistency, in the 6th article, it is a matter of inferior consideration, for the act there spoken of is in relation to pledges other than that now before the court, but we apprehend none such really exists. The interpretation attempted to be given to the words, in public form, would introduce a kind of act unknown to our law, which requires but two; those which make proof by themselves, and those which do not: The former are called authentic—the latter, *sous seing privé*. If every act to which a public form was given, became authentic, without witnesses, and without the signature of a public officer, then there would, in reality be no difference between such an instrument, and one under private signature; and the law would be made to mean nothing, when it directs, that pledges shall be evidenced by an act either in public form, or by private signature, duly registered.

This inquiry is, however, of inferior importance; because the article of the Code, in relation to pledges of incorporeal things, directs, that they must be proved by a public act; and what such act is the Code itself defines. Civil Code, 304, 217.

But it is said the French text, uses the words public act. Now, we understand this to be the same thing as authentic act. The latter, according to the article in the Code first cited, is that "which has been recorded by public officers, having power to record public acts in the place where the act has been drawn up, and with the requisite solemnities." When we inquire from the same authority, for the definition of a public act, we do not find any given of it. We are, therefore, forced to have recourse to the laws that governed us previous to the passage of that work; and the definition given by them, is precisely that of an authentic act in our own legislation: *Per instrumento publico, se entiende el que esta hecho por persona en quien reside autoridad publica, con todas las solemnidades prescriptas por derecho, para su validition y firmeza. Febrero, p. 2, lib. 3, cap. 1, sect. 7, no. 352*

The appellants contend, this is not a public act, because notaries public in New York have no authority by the laws of that state, to

pass or record contracts such as that presented by the plaintiff. To this objection, we think the appellee has conclusively answered, that as the laws of that state have not been produced or shown to this court, we must presume in this case, as we have done in several others, that they are similar to our own; and that, consequently, the act was executed before an officer duly authorised to receive it, because such officers have authority to do so in Louisiana.

But this argument returns with fatal effect upon the appellee, when we proceed to examine the act produced; for we cannot refuse to the appellants the same presumption of similarity of laws which we extend to their adversary. The instrument by which the pledge is evidenced, would not be an authentic act in our state. It would be nothing more than one *sous seing privé*—by private signature: for it wants the number of witnesses essential to the former by our law. It is difficult, indeed, to say what it was intended to be when first made. It has the form of a private act; is without date, and is signed by the parties, and the notary as a witness. Afterwards, this notary, who was sole witness, declares that the parties appeared before him in his official capacity, and executed it; and he signs this declaration without any witnesses.

Such an instrument, if executed within this state, would neither be an authentic, nor public act; nor could it be considered as duly recorded. Two witnesses are indispensable; and the instrument must either be duly recorded, or be an authentic act, to enable the party claiming under it to obtain a preference. The commands of the legislature on this head, are not only positive, but prohibitive. They take away all discretion from the court. It is only when another of these exist, that a preference is created by the pledge of incorporeal things.

It was, most probably, from a conviction of the law being so, that the appellee caused the instrument to be recorded in this state. This recording was made in due form; but the appellants insist it was not made at a proper time.

Our Code, after declaring that acts under private signature, duly registered, are sufficient to establish a preference on the thing pledged, adds, as a condition; provided this recording is made at a period not suspicious.

We are now called on, for the first time, to affix a meaniug to these words, not suspicious; and some little difficulty is created by the indefinite terms in which the prohibition is couched. It was clearly, however, the intention of the legislature, to indicate some period after which the instrument could not be registered; and it is equally clear, the interests of the parties to the contract were not the cause of this enactment. The expressions therefore must be construed in relation to those, whom it was evidently the intention of the law to protect; persons who might have an interest in preventing privileges or preferences being obtained on the estate of their debtor.

As, therefore, the object of the law was to prevent those, who had

not, previous to the time prohibited, obtained a privilege, from obtaining one by their own act, we know of no other rule to adopt than this:—that, at whatever period the debtor could not give a preference to any of his creditors by an act of his, the creditor can not, in relation to this contract, acquire one by having an instrument which gave him none, recorded. We must either adopt this conclusion, or say the law has no meaning whatever; which would be contrary to any rule that governs courts in the interpretation of statutes: it being their duty, if possible, to give the statutes effect, and not to consider it made for no purpose. The meaning attached by the appellee to these expressions, would enable the creditor to enregister his act, one hour before the insolvent filed his bilan; but this, we are satisfied, would be defeating the clear and evident intention of the legislature, and render the enactment useless. *Lex neminem cogit ad vana.*

Applying these principles to this case, we think the recording was made, to use the language of our law, at a suspicious time. It was enregistered on the 31st January, 1826, in a notary's office in this city. It makes a part of the admissions of the parties on record, that nearly two months previous to this recording, the insolvent had made application to the banks for time to pay his debts; declaring his inability to comply with his engagements—that the request had been refused—that suits had been commenced against him before the act had been enregistered; and that, he shortly after claimed the benefit of a *cessio bonorum.*

Repeated decisions of this court, founded on the laws of Spain, have settled, that a preference cannot be given by a debtor to one of his creditors, in what is called *tiempo inhabil.* That, when there exists an inability to pay debts, and a cession of property follows soon after, the debtor can not make any change in the rights of his creditors; that, actual is the same as declared insolvency. In this case we are satisfied that at the time the act was recorded, Saul could not have given a preference to any of the persons to whom he was indebted; and we conclude, the creditor could not acquire one by his own act. 3 *Martin*, 270; 4 *Ibid.* 238; 2 *N. S.* 61.

It was urged on the court, that there was an acknowledgment on record, that the instrument was executed in New York; and that this must be understood to mean the act was executed according to the laws of New York. But we are clearly of opinion, that no such inference can be made from this fact. The admission of the execution of an act, in our understanding, means nothing more than that the instrument was signed according to its purport, and dispenses with any proof. But it proves nothing more. There are many acts made and executed contrary to law in every country. It is also plain to us, that the admission was not contemplated to have this effect at the time it was made. If such had been the meaning of the parties, it was unnecessary for the appellee to have followed it up in the statement, by obtaining another admission from the appellants—that Cooper who signed it, was a notary public in the state of New York,

and that the attorney in fact who executed it, was duly authorised so to do.

It was also contended, that this case came within the principle on which this court has decided, that an act of sale of immovable property *sous seing privé*, followed by delivery, was good against creditors, unless they were injured by it. But the cases are quite dissimilar. In respect to the latter, our Code declares that the sale by private signature, passes the property to the buyer. It does not, of course, make a part of that which is transferred by the insolvent debtor to his creditors. When they came forward, therefore, to take it from the purchaser, they came to assert a right given by positive law alone; and it was held that our legislation did not authorise this claim, unless they had been injured by the transaction. But in this case, no ground can be found on which the court could take that position. The contract of the pledge did not transfer the property. It passed by the cession from the debtor to his creditors, and made a part of the effects surrendered to them; and it is the appellee who claims a preference on it. The appellants meet this, by presenting against the demand, a textual provision of our law which declares, that the property of the debtor is the common fund of his creditors, and that it must be divided rateably, unless there exists among them some lawful cause of preference. They show another, which declares that this lawful cause of preference on a pledge, must be established by an authentic act—or one under private signature, duly registered at a time not suspicious. This act, for the reason given, is neither authentic, nor one *sous seing privé* duly recorded. Our judgment, therefore, must repeat the language of the law, and direct the property to be divided rateably among the creditors.

The third case, that of Brown & Son, comes entirely within the principles of law just applied to that of Astor, and must receive a similar judgment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, so far as it respects the claim of the children of Joseph Saul the insolvent, be affirmed with costs; and so far as the same confers a privilege on J. J. Astor, and A. Brown & Son, and directs them to be paid out of the proceeds of bank stock to them pledged, that it be annulled, avoided and reversed: and that they pay costs in this court.

Grymes and *Hennen*, for Astor.
Mazureau and *Rawle*, for Saul *et al.*
Morse, for Brown.
Eustis and *Livermore*, for the appellants.

Butler *v.* Her Creditors. V, N. S. 624.

PARISH Court of New Orleans.

The liability of a tutor is not affected by his neglect to give bond and security, this would be taking advantage of his own wrong.

Purdy *et al.* *v.* Hood *et al.* V, N. S. 626.

A person who is a partner of the defendant, in a particular adventure, for which he has advanced the funds, will have a preference, on the object of such adventure, over attaching creditors of defendant.

PARISH Court of New Orleans.

MATHEWS, J., delivered the opinion of the court.

This suit was commenced by attachment; and merchandise in the possession of Lockhart & Arrott, merchants in the city of New Orleans, was seized, which had been consigned to them by the defendants from Philadelphia. The cause, as shown by the record, was first heard and determined between the original parties, and judgment rendered in favor of the plaintiffs for the sum by them claimed; and afterwards examined and adjudged in relation to the claim of the intervening parties, which was sustained by the judgment of the court below: and the plaintiffs appealed.

The persons who intervened in the cause, claim as partners with the defendants, having an equal and common right to the property seized by virtue of the writ of attachment, alleging that they are creditors of the partnership, in consequence of having paid out of their own funds the entire price of the goods seized; and that as a loss was experienced on the adventure, nothing remains to be shared and partaken by the defendants. The testimony of the case proves the facts alleged by the claimants; but to this testimony two bills of exceptions are found on the record, taken by the counsel for the

plaintiffs. First. To the admissibility of the evidence of a witness taken on the interrogatories under a commission issued by the court of the first instance. Secondly. To the admission of an affidavit made by one of the defendants before an alderman of the city of Philadelphia, by which he acknowledged and confessed that the goods, now in dispute, were the joint property of his firm and that of the claimants. These exceptions must be disposed of before the legal questions of the cause can be discussed. The first is based solely on the ground of the insufficiency of the answer given by the witness to the fourth cross interrogatory. This interrogatory is divided into a variety of questions; although the main object seems to have been to obtain a statement of the general accounts as they existed between the claimants and defendants.

The answer states, that the joint interest in the parcel of goods, about which the present contest exists, is the only transaction which ever took place between Hood & Co. and Cohen & Nisbet, and that there is no general account between them.

The subdivisions of the principal question have been explicitly answered; and we are of opinion that the testimony was properly admitted in the court below. The affidavit of the defendant, considered as an extrajudicial confession, was also correctly received in evidence, as it could not in any manner affect the interest of his firm; for it would be indifferent whether they are bound to the plaintiffs or the intervening party; any prejudice or feeling they might be supposed to have in favor of one or the other party, ought not to render confessions on their part, incompetent.

The legal questions which arise in the case, may be considered in the following order:—First. Whether the joint purchase of the goods in question, by Hood & Co. and Cohen & Nisbet, for the purpose of selling them on a profit, having relation only to a single transaction, places the partners concerned in it on the footing of partners in trade, and entitles them to the benefits of the rules of law relating to commercial partnerships? Secondly. Whether a copartner who is creditor of the firm, is entitled to a preference on the partnership property over the creditors of his partners individually?

Partnership, as defined by our Code, as a synallagmatic and commutative contract made between two or more persons, for the mutual participation in the profits which may accrue from property, credit, skill or industry, furnished in determinate proportions by the parties. See the Louisiana Code, art. 2, 772. According to a definition given by Gow, a late writer on the subject, in pursuance of the rules which govern it in England, it is said to be "a voluntary contract between two or more persons, for joining together their money, goods, labor and skill, or either, or all of them, upon an agreement that the gain or loss shall be divided proportionably between them; and having for its object the advancement and protection of fair and open trade." See his Treatise, p. 2.

This last is a definition of a commercial partnership; which, accord-

ing to the Louisiana Code, is formed for the purchase of any personal property, and the sale thereof, &c. See art 2,796.

It is true, that a community of property does not of itself create a partnership, however that property may be acquired, &c. See the art 2,777, cited by appellant's counsel. But when personal property is acquired jointly by two or more persons, for the express purpose of being sold on joint account, with a view to gain, it appears to us that a partnership is created in relation thereto, and that the rights and claims of the parties must be regulated agreeably to rules appertaining to such contracts.

The owners of property held in partnership, have not separately a particular interest in distinct portions of the common stock, but possess it each as proprietor of his undivided portion, and of the whole: or, as expressed by writers on the common law of England, in ancient Norman dialect, each partner is possessed *per my et per tout.* See Gow's Treatise on the Law of Partnership, 49. Creditors of a partnership have, according to law, a preference allowed them, on the joint property of the concern, over creditors of the individaal partners, in payment of debts. Same author, 317.

A partner may be a creditor of the partnership for the sums which he has discharged for the common benefit, &c. See Code, art 2,835.

In the present case it is shown, that Cohen & Nisbet paid for the merchandise out of their own funds, which was purchased jointly for them and the defendants in the attachment, and thereby became creditors of the partnership to that amount; and in relation to the joint stock, must be considered in the same situation with any other creditors of the partnership, and have a claim on its funds in preference to creditors of the partners inidvidually. Consequently they are to be preferred to the plaintiffs, who are creditors of Hood & Co. alone. And as the evidence shows that nothing will remain of the common stock after payment of partnership debts, the judgment of the parish court is correct in adjudging the fund in the hands of the garnishees to the intervening party.

In pursuance of the expressions of our attachment law, which are very general, the apparent right of the defendants to the property seized was, perhaps, sufficient to support the writ, and bring the debtor before the court, and judgment was properly rendered against them. After judgment their rights to the undivided stock might have been sold under execution; and the purchaser would then assume the situation of the partners, whose interest was thus sold, so far as to be entitled to any surplus that might remain to them on a final settlement and account, rendered at the instance of such purchaser at sheriff's sale. But in the present case, the evidence taken in consequence of the intervention of the copartners, fully establishes the state of accounts between them and the defendants, as assumed by the court below in its final judgment, which we believe to be legal and equitable.

[Purdy *et al. v.* Hood *et al.*]

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiffs.

Strawbridge, for the defendants.

Henry *v.* Hyde *et al.* V, N. S. 633.

A father who is not indebted, may purchase property for his child, and in its name, and subsequent creditors cannot attack the act as fraudulent.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff obtained an injunction to prevent the sale of a lot of hers, under a *fieri facias* against her father. The defendants refused her application on averment that the lot is her father's and not hers—that the deed under which she claims, was made in fraud of his creditors—that she was a minor at its date, and could not acquire property.

There was a verdict for the plaintiff, which the defendants unsuccessfully attempted to set aside. The injunction was made perpetual, and the defendants appealed.

The defendants having pleaded fraud, were bound to establish it by proof; for fraud is never presumed. Of the evidence introduced, which is all testimonial, the jury were the proper judges; and the inferior court has approved their verdict. Indeed, we cannot see how it could have been otherwise.

The debt of the plaintiff, on which judgment was obtained in this court, in July, 1825, 4 *N. S.* 51, is posterior in its creation to the date of the deed; which is a notarial one, and is not alleged to be antedated. So that it does not appear, that, at that time, James Henry had any creditor to defraud.

If he owed no debts, and *de non apparentibus* and *non existentibus, eadem est lex*, he might well purchase property for his minor child, in her name.

The premises were never the father's property. If the deed was fraudulent and void, it passed no property from the vendor. If the father acquired any right by furnishing the price, he or his creditor must exercise it directly, by an action. In Richards *v.* Wallace *et al.*, 3 *N. S.* 338, we held, that if the sale to the plaintiff was fraudulent,

suit should have been brought to set it aside. The sale could not be treated by the defendants as a nullity, and the property sold as if no alienation had taken place.

The only circumstance, which might be of any weight, in proving the fraud, is, that the price of the premises was paid by the father; but of what weight can it be, when there is not the least tittle of evidence that he owed a farthing at the date of the deed, which is attacked as fraudulent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Preston, for the plaintiff.

Lockett, for the defendants.

Johnson *v.* Field. V, N. S. 635.

SECOND District.

If a suit be brought to recover slaves which are named in the petition of the plaintiff, and the defendant admits that he is in possession of slaves as designated in the petition, it is *prima facie* evidence the slaves sued for, and possessed, are the same.

Zacharie *v.* The Orleans Insurance Company. V, N. S. 637.

FIRST District.

Insurers are responsible until the vessel is moored in good safety at the port of discharge.

Patin *v.* Poydras's Executors. V, N. S. 639.

FOURTH District.

Decided, when the counsel who had the principal charge of the cause, and on whom plaintiff placed his greatest reliance was unable to attend from illness, that this was a good reason for postponing the trial. The contrary doctrine would lead to the most intolerable hardships.

Applegate *et al.* *v.* Morgan *et al.* V, N. S. 642.

Plaintiff cannot take a nonsuit after general verdict.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

This case comes before the court on an assignment of errors, appa rent on the face of the record. In the court below the cause was submitted to a jury, who found a general verdict for the defendants, and after this verdict was returned into court, the plaintiffs, by their counsel, moved for a judgment of nonsuit, which was allowed by the judge *a quo;* and from this judgment the defendants appealed.

The error alleged, is the illegality of a nonsuit, or discontinuance of their action by the plaintiffs, after a general verdict found in favor of the defendants. That plaintiffs have not such control over their suits as to discontinue or claim the benefit of nonsuit after general verdicts, is a principle settled and established by the decision of the case cited by the counsel for the appellants, from 7 *Martin*, 490. And the doctrine therein recognised has not been altered by the Code of Practice.

It is true that the article 491 of this work authorises a plaintiff to discontinue his suit at any stage before judgment; but this provision of law relates solely to trials before the court, without the interven-

tion of a jury. The article of that Code, which governs the present case, is 532, and relates to a trial before a jury; wherein it is declared that a plaintiff is at liberty, on paying costs, to discontinue his suit before the jury retire to consider of their verdict—but if a verdict be rendered, it shall be binding, &c.

In the present case, it does not appear that any motion was made for a discontinuance or nonsuit before the jury had withdrawn, and returned into court with their verdict.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and proceeding here to give such judgment as, in our opinion, ought to have been given in the court below, it is ordered, adjudged and decreed, that final judgment be entered for the defendants and appellants, with costs in both courts.

Duncan, for the plaintiffs.

Saunders, for the defendants.

Saunders *v.* Ingram. V, N. S. 644.

The parish court has jurisdiction of a claim for 300 dollars, and may give judgment for that sum and interest from judicial demand.

And of such case the Supreme Court has jurisdiction.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

This case is somewhat peculiarly situated. The suit was commenced in the parish court of East Feliciana, and judgment being there rendered, in favor of the defendant, the plaintiff appealed to the district court, wherein judgment by default, was given against the defendant, and afterwards made final; from which he appealed to this court.

The sum of 300 dollars is claimed by the petitioner, with interest &c., and judgment was rendered for that amount, with interest, in the district court.

The appellee moves to dismiss the present appeal, in consequence of having come indirectly, from a parish court, the jurisdiction of which does not extend to an amount, sufficient to authorise an appeal to the Supreme court: because the maximum of jurisdiction of the

former, as enacted by law, does not equal the minimum, granted by the constitution to the latter.

According to law, the jurisdiction of parish courts throughout the state, is limited to personal actions, where the matter in dispute shall not exceed 300 dollars; subject to an appeal to the district courts, above the sum of 100 dollars, exclusive of costs, &c. See 2 *Mart. Dig.* 222, sect. 1, 19. Appeals of this sort are to be prosecuted according to the rules which are applicable to those which might have been taken from the inferior courts of the late territorial government, to to the superior court, as provided for by the act of 1807. See 1 *Mart. Dig.* 436, sect. 2, 20.

The jurisdiction of the Supreme Court, as organised by the constitution and laws of the state, is limited to civil cases, when the matter in dispute exceeds the sum of 300 dollars. From these provisions of law, it appears to be almost a self-evident proposition, that the jurisdiction of the parish courts, and that of the Supreme Court, could never coincide; the one cannot descend, nor the other rise, so as to meet. But subsequently to these laws, our Code of Practice has received the sanction of legislative authority and been promulgated, so as to govern the proceedings in the present case. The 1st article of this Code provides, that when the jurisdiction of the judge before whom a suit is brought, is limited to a certain sum, the question of jurisdiction must be decided by the amount claimed, and not by the sum actually due, not including, however, the interest of the costs which have been subsequently incurred.

It is believed that in pursuance of a correct interpretation of this act, a parish court may, in a case where 300 dollars are claimed, give judgment for that amount, and interest from the judicial demand; the jurisdiction of the court, being thus far extended by the provisions of the Code, authorises a judgment, in truth, for more than 300 dollars.

No appeal can be taken directly to the Supreme Court, from a judgment rendered in any of the parish courts of the state, except that of New Orleans. But when the cause regularly passes by appeal, through a district court, to the superior court, and the matter in dispute amounts to more than 300 dollars, as it does in the present case, by the addition of legal interest, we are of opinion that the last appeal ought to be sustained.

An appeal from a parish, to a district court, authorises an examination of the case *de novo*, and either party to the suit may, by leave of the court, amend his pleadings, so as to bring the merits fairly before the appellate tribunal. If no amendments be made to the pleadings, the trial is to proceed on them as they have been made in the court of the first instance, and transmitted on the record. The only addition required, is an answer by the appellee, that there is no error in the proceeding of the inferior court, new evidence may be given in the cause, and so far, it is a trial *de novo*, both according to the act of 1807, and the 598 art. of the Code of Practice; but as no new answer is required from the defendant, (which, if he be appel-

lant in the higher court, would be absurd) the only additional pleading absolutely directed, is the answer, that there is no error, &c. When the appellee does not appear, and plead as directed by law, the appellant is at liberty to proceed *ex parte*, and have his cause heard; and such judgment must be given by the court, as the nature of the case may require. No judgment, by default, is contemplated by the law; and such a proceeding, appears to us to be absurd, when a full answer to the plaintiff's petition and claim, goes upon the record from the court below, as it did in the present case.

The appellant in the district court, after the delay allowed to the appellee, to plead that there was no error, &c. might have required the court to proceed *ex parte*, and give judgment.

The steps taken in the cause appear not to have amounted to any thing more, except the error in granting a judgment by default. But as this error may have had an improper influence on the subsequent proceedings, it is believed that the justice of the case requires, that it should be remanded to the district court, for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled: and it is further ordered, &c., that the cause be sent back to said court, to be again tried; and that the appellee pay the costs of this appeal, &c.

Watts and *Lobdell*, for the plaintiff.

Preston, for the defendant.

Lewis v. Decoux. V, N. S. 649.

FOURTH District.

A party interrogated on facts and articles, is not compelled to answer categorically, if he swears that his memory will not permit him to do so.

Babcock *v.* Penniman. V, N. S. 651.

Minors in trade are not bound by contracts in trade, unless they be emancipated.
Marriage in the state of Mississippi, does not produce emancipation, nor make a promise binding, though the promisee should be of this state.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The defendant, sued for goods sold and delivered, has relied chiefly on the plea of infancy—there was judgment against him, and he appealed.

The record shows, that it was proved the defendant was born in the state of Massachusetts, in June, 1805, and in December, 1824, being then a resident of the state of Mississippi, he ordered the goods, the payment for which is now claimed, to be sent him, his letter bearing date from Pinkneyville, M. T. November, 1824; and they were accordingly sent. By letters, dated at the same place, October 6, 1825, and April, 1826, he promised payment. He was married in December, 1825. From November, 1824, to his majority, in June, 1826, the defendant traded as a merchant in Pinkneyville. It is in evidence, that the common law of England prevails in the state of Mississippi, and that according to it, the age of majority is twenty-one, and minors can not bind themselves legally, by their contracts for the purchase of goods to trade with. Emancipation is there unknown.

It does not appear that the defendant was ever in this state, but the plaintiff's counsel contends, that the circumstance that the goods having been sent, at the defendant's request, from the plaintiff's store, in New Orleans, constitutes a sale in this state.

2. That minors in trade, may bind themselves for goods, even when they are not emancipated.

3. That if emancipation be necessary, the defendant having been married in December, 1825, was thereby emancipated, and his posterior promise in April, 1826, is binding on him.

1. It is unnecessary for the defence of this case, to examine the first proposition. It may be taken as admitted.

2. Our Civil Code does not recognise any binding power in the contracts of minors engaged in trade, except after their emancipation. Art. 379, 1775, 1778, 1867 and 2222. It would be absurd to imagine, that minors of any age, under twenty-one, should be bound by mercantile contracts. The law does not withhold the protection it owes to persons of tender age, till they have reached their eighteenth

year, and in the judgment of their father, or a family meeting, or the case of an orphan, the individual has, by emancipation, been declared to possess sufficient discretion, to be trusted with the management of mercantile concerns.

In this case, at the time the plaintiff parted with his goods, the vendee had reached his twentieth year, but he had not been emancipated. Under the laws of this state he was not legally bound.

3. It is true, in April, 1826, he had been married and promised to pay for the goods. Had the marriage taken place in this state and the promise, then perhaps, the marriage working emancipation, the promise would have been binding. It is, however, in the state of Mississippi, the domicil of the defendant. There marriage has no effect in removing the disabilities of infants, in contracts like the present: as this promise was invalid in the state of Mississippi, the circumstance of the promisee being a citizen of this state, can not give it validity.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both courts.

Smith, for the plaintiff.

Hoffman, for the defendant.

Donaldson *et al. v.* Dorsey's Syndics. V, N. S. 654.

Minors are not bound by a sale of their property made under judicial proceedings to which they were not parties.*

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiffs, children and heirs of C. Van Pradelles, state that their said mother having sailed in a vessel which had not been heard

* As the present section of this compilation is going to press, the 13th volume of the Louisiana Reports has made its appearance. In the May Term of this year (1839) the case of Lalanne's Heirs v. Moreau, p. 431, was decided, (the court then consisting of MARTIN, PIERRE ADOLPHE ROST, and GEORGE EUSTIS, Justices.)

ROST, J., delivering the opinion of the Court, said:—In this opinion the court apply to the case of minor heirs, and re-affirm earnestly, the doctrine of Michel's Heirs v. Michel's

of since 1813, they were put into provisional possession of her estate. 4 *N. S.* 506. That the defendants' insolvent, before his failure had possessed himself of a house, part of the estate of the plaintiff's mother, which he refused to surrender; and the defendants have possessed themselves of said house, as part of the estate surrendered to them. The petition concludes with a prayer, that the defendants may be decreed to abandon the premises to the plaintiffs.

In a supplemental petition, the plaintiffs stated, their mother made

Curator *et al.*, 11 *Lou. Rep.* 149, that "when there is a formal decree of the court of probates recognising the necessity of the sale for the payment of the debts, and preceded by an opportunity on the part of the attorney for absent heirs (by notification to him of the petition of the curator) to show that, in fact, no such necessity existed, the purchaser is not bound—to look beyond this." The court further declare, that sales directed or authorised by the court of probates are judicial sales to all intents, and the purchaser is protected by the decree ordering them. That "the necessity and wisdom of such a rule of property has long been felt and acknowledged by the most important States of this Union—that their courts all maintain that a purchaser under the decree of the orphans' court is bound to look to the jurisdiction, but that the truth of the record concerning matters within that jurisdiction cannot be disputed." The learned Judge proceeds to show, that the rigor of the Spanish system (whereby the act of the judge in cases of this kind, was a mere authorisation given to the tutor to sell the minor's property upon an *ex parte* statement, made by him and taken for true, and where a *contestatio litis* was impossible to arise, but four years were allowed the minor after majority to contest the sale) is by no means applicable to our reformed system, wherein are provided family meetings, (first introduced in 1808,) without whose advice no alienation can take place, and an under-tutor, in all cases of tutorship, bound to attend all family meetings, and, in case he disapprove, bound to raise a *contestatio litis* with the tutor; and the redress of an appeal remains for either party if dissatisfied with the judge's decree. All these provisions by legislative enactment have given greater security, than existed in the Spanish codes, to minors of Louisiana, that their property shall not be alienated without necessity, and to the decrees of courts under which many titles grow up, they have given greater force; in fine, have virtually repealed the former laws.

The informalities complained of by the petitioners in the present case were, it is true, all prior to or accompanying the decree for the sale, such as the want of the three days' notice to the members of the family meeting previous to their assembling, the omission of the under-tutor and curator *ad lites* to take the requisite oath until eleven days after the family meeting, and of the tutor to give any surety before the order to sell and sale; finally, that the order for appraisers left their names in blank. However, two persons were afterwards appointed who made the appraisement according to law, and their oath as well as the appraisement are of record. The court say that, under these circumstances, all the substantial requisites were complied with; the blank was a mere clerical omission which might be supplied *nunc pro tunc*, and which the Supreme Court itself might supply even on the trial, inasmuch as the appointment of appraisers formed no essential part of the order of sale, but might be the subject of a subsequent order. It is not to be disguised that the spirit of this decision would lead to an entire revolution in that solemn and compact jurisprudence relative to minors, to which the case of Chesneau's Heirs *v.* Sadler furnishes the key, and of which the texts of Justinian and the articles 1862 and 2228 of the Louisiana Code form the bulwarks.

a simulated sale of said house to Johnson; that West styling himself the agent of the plaintiffs' aunts, executrixes of the plaintiffs' mother, brought a suit against Dorsey, the defendants' insolvent, the curator of Johnson, in which the sale to Johnson was declared a simulated one, and without consideration, and it was ordered to be sold; that the proceedings in said suit are void as against the plaintiffs; and they pray that so much thereof, as decrees the sale of the house, be declared null and void.

The general issue was pleaded; there was judgment, as in case of nonsuit: and the plaintiffs appealed.

The record shows the plaintiffs' mother became the owner of the premises by purchase; that the plaintiffs have been sent into provisional possession of her estate, as her heirs apparent; that she made, for reasons which do not appear, a simulated sale of them to Johnson, who did not pay any thing. Therefore the simulation appears from the best possible evidence against the defendant, his own oath received as evidence without opposition.

He acquired no title by a sale made under a judgment, to which neither the plaintiffs nor their mother were parties.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and that the plaintiff recover the premises from the defendants; and that the cause be remanded, with instructions to the judge to inquire into the value of the improvements made by the defendants, and the amount of rent due: and it is further ordered, that the appellees pay the costs of this appeal.

M'Caleb, for the plaintiffs.

Hennen, for the defendants.

Dicks *et al.* v. Barton. V, N. S. 657.

The endorsee need not give notice to the maker of the transfer of the note on which suit is brought.

After a cause is argued, no motion can be made to hasten judgment until the time given by law for rendering it has elapsed.

After a motion for a new trial is overruled, the court may proceed at once to give final judgment.

THIRD District.

[Dicks *et al.* v. Barton.]

PORTER, J., delivered the opinion of the court.

The record in this case, not being certified in such a manner, as to enable us to examine the cause on its merits, our attention is confined to the bills of exceptions.

The first was taken to the judge's overruling several exceptions contained in the defendant's answer.

One of these exceptions is, that the copy of the petition served on the defendant, did not correspond with the original. The particular variance is not set out. We have collated them, and can find no difference, except that in the document filed with the answer, the endorsements on the back of the note annexed to the petition, are not copied. Admitting, however, there are others, there is not evidence before us to enable us to say that the judge erred. The sheriff's return states, that he served a copy of the petition on the defendant. There is no proof that the copy which the defendant has annexed to his answer, is that which was served on him; consequently, the sheriff's return must be received as true. Code of Practice, no. 275.

The second exception is, that the petition did not contain an averment, that notice of the transfer, of the note sued on, to the plaintiff, was ever given to the defendant. There was no necessity for the petition containing such an averment, as, whether the defendant had notice of it, or not, he was responsible to the endorsee.

The third exception, as it is called, went to the merits, and as the evidence does not come up, its correctness cannot be gone into here.

The second bill of exceptions is of a very novel kind. It states that, after the evidence was gone through, the defendant moved for judgment in his favor; and that, notwithstanding that motion, the court gave judgment the next morning for the plaintiff, without overruling the motion. This is gravely excepted to as illegal, unjust, and irregular.

It is extraordinary, that counsel should deem it their duty, to place such matter before this court, for its examination. There could be no such thing as a motion, technically speaking, for the judge to give judgment for one party or the other. After the evidence was gone through, and no argument offered, the case was with the court, and out of the reach of motions, until the time had elapsed within which the law requires judgment to be pronounced. And if such a motion could have been made, and entered on the minutes, in what more effectual manner could it be overruled, than by giving judgment for the plaintiff; that was, beyond a doubt, a decision on the motion, and consequently, it could not be a ground for exception, that the motion was not disposed of.

The next two bills of exceptions relate to the time at which the motion for a new trial was made, and the alleged impropriety of the court hearing argument on it, before the party who made it was ready to go into the discussion. It is unnecessary to express any opinion on these points, as the appellant can have every advantage in discussing the case here, as if it had been regularly listened to

below. It would be doing a vain thing to remand the cause to have the motion argued in the inferior court, and have the cause ultimately returning to us in the same shape.

The alleged grounds for a new trial are two. One, the overruling the exceptions in the answer, on which we have just expressed an opinion; the other, that though the plaintiff proved the signature of the defendant, and an interlineation in the note to be in his hand writing, yet that he did not offer the note in evidence. It is difficult to conceive how this proof was obtained in open court, in relation to the execution of the note, unless it was offered in evidence. We suppose that the objection means, that after the instrument was proved, the plaintiff neglected to formally state, that he then offered it in evidence. We deem it unnecessary to adduce any argument, to show the perfect correctness of the opinion of the court below, in not considering this a legal ground for a new trial.

The plaintiff has pressed on us the propriety of affirming the judgment below with damages. The defence, through all its parts, certainly shows that delay was the main object. But there is a difficulty in regard to the regularity of the proceedings below, though not relied on by the defendant, that saves him from the penalty. The judgment was rendered the 26th—a motion for a new trial was made the same day. This motion was argued and overruled on the 27th, and judgment signed before three days had expired. We had doubted whether the language used in the Code of Practice, did not make it the duty of the court to wait three days under any and every circumstance, before judgment was signed. But as we believe the only motive for giving this time, was to allow the party cast to move for a new trial—no error was committed in signing judgment as soon as the motion was made and disposed of. The same principle was decided at the last term of the western district, in the case of Gardere *v.* Murray, that was much contested, and fully discussed by the counsel engaged in it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court affirmed, with costs.

Pierce, for the plaintiff.

Preston, for the defendant.

Gilman *v.* Horseley. V, N. S. 661.

Note payable to A B *as administrator*, authorises a suit by the payee in his own name.
A final judgment in a sister state, authorises the plea of *res judicata* in this.
An affidavit asserting a belief that a witness is material, will not authorise a continuance.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action is brought on a judgment rendered in the Circuit Court of the United States, for the district of Kentucky. The plaintiff styled himself in the pleadings of that suit, *administrator* of the estate of Joseph Gilman, deceased. And the obligation on which the action was instituted, was made payable to the plaintiff, as administrator of Joseph Gilman.

First. The defendant pleads that the petitioner is not the administrator of Joseph Gilman, as he pretends and alleges.

Secondly. That there is no such record as that set forth in the petition.

Thirdly. That if there be, it is no evidence of a debt due by the defendant, because it shows that judgment was rendered before citation.

Fourthly. That Joseph Gilman was indebted, in his lifetime, to the defendant, in the sum of 1200 dollars, which he is entitled to set off against the present demand.

I. This action is not brought by the plaintiff, as administrator, nor was it necessary for him to do so. The note was payable to himself: he became responsible to the estate he represented, by taking it in his own name, and consequently has a right to enforce it. The words *as administrator*, are merely those of description; and there cannot be a doubt, that if the defendant had any demand against the petitioner, in his own right, he might plead it as a set-off in this action. 5 *Mart.* 202; *Ibid.* 463; 2 *N. S.* 27.

II. The record is duly certified under the act of congress, and there is not the least foundation for this plea.

III. The record does not show that judgment was rendered before citation. The *capias ad respondendum*, bears date the 6th August, 1824, and was executed on the 6th September, of that year. The judgment is of the October term following.

IV. Whether the sum of 1200 dollars was due by the estate of Joseph Gilman, to the defendant, could not be examined in this suit, as it had been already decided by the circuit court of Kentucky. The

note on which the action was instituted contained a condition, that if the defendant should legally establish that he had paid Joseph Gilman, in his lifetime, 1200 dollars, credit was to be given for that sum. The declaration expressly stated that this condition had not been complied with, and that therefore, the defendant was responsible for the whole amount of the note sued on. Of this opinion was the court, and gave judgment accordingly. And the weight and authority of this judgment, as forming *res judicata*, between the parties on this point, is not weakened by the defendant making no defence. If there was no investigation of his rights on this point, it was his own fault, and he must bear the consequences of his neglect.

The application for a continuance, on the affidavit of the defendant and R. L. Booker, was properly overruled. The first stated the absence and materiality of witnesses, in relation to the set-off of 1200 dollars, which had already been decided between the parties, and could not be re-examined here. The second was too vague: it expresses merely the belief of the affiant.

We have hesitated, whether the judgment of the court below, should not, in pursuance of the prayer of the appellee, be affirmed with ten per cent. damages: but as the defendant may have thought he was entitled to the continuance, we think it sufficient to order, adjudge and decree, that the judgment of the district court be affirmed, with costs.

Whittlesey, for the plaintiff.

M'Caleb and *Byrnes*, for the defendant.

Miller *v.* Reynolds *et al.* V, N. S. 665.

Laws are never presumed to have a retrospective operation.

Notes taken up with the endorser's name in them are *prima facie* evidence of payment by the maker.

PARISH Court of New Orleans.

Porter, J., delivered the opinion of the court.

The plaintiff furnished materials to Reynolds for building, who used them in the erection of a house for Bermudez. Reynolds having failed to pay for them, the suit was brought to have judgment against

him, and to obtain an order of seizure of any money that might be due to him by Bermudez. The latter contested the action, and obtained judgment in his favor in the court of the first instance. The plaintiff appealed.

The payment of the amount due by the appellee to the undertaker of the building is proved, but the plaintiff contends these payments were made in anticipation, and therefore void against the furnisher of the materials.

It is true the 2744th and 2745th articles of the new Code declare, that persons furnishing materials for buildings, may cause the moneys due to the undertaker by the owner to be seized; and that the payment which the proprietor may have made in anticipation to the undertaker, are considered with regard to workmen, and those who furnish materials, as not having been made.

But this contract was entered into before the enactment of these provisions in our Code, and it is the opinion of this court, that the rights of the parties must be governed by the law in force at the time the agreement was made. It is a sound rule of construction, never to extend laws to contracts made before their passage, unless the will of the legislature, that they should be so extended, is clearly and explicitly declared. In the present case, the undertaker, at the time he bargained for the building of the house with the defendant, had a right to get his money paid to him at any period before the credit which he gave expired, if the latter chose. Admitting that a subsequent law might vary the right, which we doubt, we are clear it can not, unless the statute expressly directed that its enactment should apply to agreements made previous to its passage. See the case of White *et al. v.* Brown *et. al.*, 3. *N. S.* 17.

This opinion renders it unnecessary to examine the bill of exceptions, taken to the introduction of the original contract by the defendant, to show that the plaintiff was surety for Reynolds in the contract for building the house.

And, as to that which excepts to the opinion of the judge, that the notes given by the defendant to Reynolds, with proof of his endorsement on them, were evidence of payment by the maker, we think it untenable. They were *prima facie* evidence of that fact. Starkie on Evidence, p. 4, 1089; 9 Serg. & Rawle, 386.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Lockett, for the plaintiff.

Seghers, for the defendants.

Owens *v.* Mitchell. V, N. S. 667.

Collateral kindred claiming an estate, are bound to show the lineal heirs have ceased to exist.

COURT of Probates of New Orleans.

MARTIN, J., delivered the opinion of the court.

The plaintiff demands the estate of Carrol; alleging that she is his sister, and believes herself to be the only heir. This was denied by the defendants. The judge of probates directed the estate to be provisionally delivered to her, on her giving security to account with any other heirs of Carrol, or whoever might be therein concerned. The defendant appealed.

The testimony shows, that Carrol left no descendant, and that the plaintiff is his sister.

We are of opinion this does not suffice. Every one had once relations in the ascending line, and his collateral kindred claiming, the estate, are bound to show that the lineal heirs have ceased to exist. Hooker's Heirs *v.* Tippet's, 12 *Martin*, 390.

It suffices to deny that there are heirs in the descending line, and this being a negative fact, no proof need be given of it. It is for the adverse party to show that there were some; and then their death must be proved by the claimants. But collaterals must always prove the death of ascendants by evidence, or show that one hundred years have elapsed since the birth; in which case death is presumed, and not before.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, and that the defendant have judgment as in case of nonsuit, and that the plaintiff pay costs in both courts.

Hoffman, for the plaintiff.

Preston, for the defendant.

Patterson *v.* La Farge. V, N. S. 669.

An authority to an agent to compromise and arbitrate, does not authorise a submission to amicable compounders with a renunciation of appeal.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action is brought on two bills of exchange, drawn by defendant's agent in favor of the plaintiff, in pursuance of an award made in France by arbitrators chosen by them, to settle the affairs of the partnership, of which the parties to this suit are members.

The petition sets out the partnership; the difficulties that had arisen between the partners; the power of attorney given by the defendant to an agent in France, to settle the affairs of the firm; the substitution of that power to another; his submission to arbitration; the award of the arbitrators; the drawing of the bills in conformity with the award; the refusal of defendaut to accept them; and concludes with an allegation, that the defendant had therefore become liable to pay the amount of the bill, with damages, interest and costs.

The answer admits the partnership, but alleges that the defendant had advanced all the capital stock; that the firm had sustained heavy losses; that the plaintiff had withdrawn a large portion of the capital; that the balance due by him to the defendant, was 153,324 francs; that the award was obtained fraudulently, and was null and void; and that all the other allegations in the petition were untrue.

The first, and one of the most important questions in the cause is, whether the power of attorney, given by the defendants, authorised the submission to arbitration?

It was executed in New York, and confers in the usual terms, authority on the agent to demand, collect and sue for, by all lawful means any money that might be due the principal, or firm of La Farge & Patterson; "or also to make, or cause to be made, a dissolution of the firm by public notice, *arbitration*, suit, process, or otherwise, howsoever, according to the laws of France."

After an enumeration of various other powers, not necessary to be set forth, the instrument contains another clause, confining the authority in the attorney in fact, to sue and recover, by all lawful means from William D. Patterson, all and every such sum of money as may be by him to the principal, upon settling the concerns, affairs and transactions of the firm of La Farge & Patterson; "and to that end, to view, examine, state, settle, adjust and balance all accounts, to compound, compromise, arbitrate, conclude and agree all differences."

The defendant insists, this authority did not sanction, nor permit the agent to confer the following power on the persons chosen to settle the affairs of the partnership.

"We, the undersigned, dispense the arbitrators with the necessity of pursuing the forms of justice, and beg of them to pronounce in the last resort on the points in contestation, as amicable compounders, in the delay of two months, upon the memorials which will be submitted to them by the parties, without being subject to the forms and delays of a suit.

"The undersigned renounce an appeal, or recourse to justice, no matter what may be the causes or motives, even for that of nullity; and in case they cannot agree, they are authorised to name a third person, whose decision will be sovereign and irrevocable."

We agree in opinion with the defendant's counsel, that in making this submission, the agent exceeded his powers. There was no authority given by the mandate, to deprive the defendant of the protection which the laws of the place where it was to be executed, might have extended to him. The renunciation is of a most extraordinary kind. The agent abandoned all recourse to justice, no matter what might be the causes or motives: so that if there had been fraud or corruption, the principal was obliged to submit to it. No man can be presumed to give such a power to another: and we are satisfied that, in the instance before us, the mandate did not express it. The authority to compound, conclude, and agree, was personal to the attorney, and cannot be extended to arbitrators, in whose selection, the person opposed to the principal, had as much choice, as he had. The power to compromise, and to arbitrate, which mean the same thing, did not authorise a submission to amicable compounders. A man may be well supposed ready to submit his differences to the former, knowing that, by the laws of France, where the arbitration was to take place, the persons so chosen must proceed according to law, and that an appeal lay from their judgment: and yet, not be willing to yield his rights to the final decision of the latter, who are governed by no rules, and abandoned to their own ideas of equity. The French Code of procedure, offers a very strong argument in support of this reasoning. By the 1009th article of that work, it is declared, that the arbitrators and umpire shall decide according to the rules of law, unless the submission gives them power to pronounce, as amicable compounders. Now, the words used in the power of attorney, ought not to have, and cannot have a greater effect, than they would have, if used in a submission to arbitration: and if the principal, in an instrument of the kind last mentioned, had submitted his case to arbitrators, or to arbitration, it is clear these expressions would not have authorised the persons named, to have acted as amicable compounders. Hence it follows, that an authority to another, to submit to arbitrators, must have the same limitation.

As, therefore, the award was made without authority, no consideration existed for the drafts on which this action is brought, and consequently the plaintiff cannot recover.

[Patterson v. La Farge.]

As to the defendant's claim in reconvention, the evidence is quite contradictory, and it is impossible for this court to say, how the balance would stand, on a full settlement of the partnership accounts. The attorney, in fact, of the defendant, swears that the amicable compounders had no evidence before them, when they made their award. But that the judgment given by them, was entirely based on an agreement, or transaction, entered into by him and the plaintiff. The reasons for the attorney making this arrangement, as he states, were, the peculiar situation in which La Farge's affairs were involved, and the responsibility which he, the agent, had incurred. That the plaintiff claimed the one fourth of the profits of the sugar estate, which he declared he had received intelligence, was sold by the defendant, for 180,000 dollars, and that he proposed a settlement on these terms:

		Frs.
CREDIT.		
¼ of the share in the profits, - - - - - -		100,000
DEBIT.	*Frs.*	
Moneys belonging to the partnership funds, withdrawn by him. - - - - - - -	40,000	
¼ of losses sustained, - - - - - -	15,000	
		55,000
	Frs.	45,000

for which he was willing to take 35,000 *francs* in drafts on the defendant; and the amicable compounders having confirmed this arrangement, the bills on which this suit was brought were drawn.

Now, it appears by the admission of the parties on record; that the plantation only sold for 110,000 dollars, at 1 2 3 4 5 and 6 years credit. The plaintiff, therefore, if the witnesses on the part of the defendant are to be believed, either committed a gross fraud in making the representation, or he had been egregiously misinformed himself of the real amount of the sale.

The testimony obtained by the commission sent out to the arbitrators, differs from this in many particulars; though they wince so much at some of the interrogatories, and refuse to answer others, that the impression left on our mind is, that there was an error committed in the settlement. But they deny, firmly, that their sentence was founded on the representation of Patterson, as to the sale of the sugar plantation, or the eventual profits that might result therefrom. On the contrary, they declare, that it was after a full examination of all the papers submitted to them by both parties, that they rendered their decree; and that no other considerations entered into their minds but those produced by the evidence.

It appears that La Farge drew largely from this country on the house in France, to pay for the sugar plantation which he purchased here. On this head the witnesses for the defendant are very particular in stating the precise amount which he remitted to meet these drafts; but they do not give the amount of the bills, the remittances

were to replace. The arbitrators state, that these drafts amounted to 60,000 francs, 22,000 of which were paid by the house. They also state, that there was no evidence furnished to them that La Farge had furnished the whole amount of the capital.

Under a view of the whole evidence we think the case is not before us in such a shape as enables us to pronounce definitely on it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

Workman and *Grymes*, for the plaintiff.

Denis, for the defendant.

Murdock *v.* Browder. V, N. S. 677.

The plaintiff may be allowed to amend his pleadings, by alleging the nullity of the judgment under which the defendant claims.

There is no incompatibility in uniting a prayer for nullity, with one for the recovery of the property.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff sues to recover from the defendant a certain tract of land, (as described in his petition,) which he alleges to be in the possession of the latter without title.

The district court gave judgment in favor of the defendant from which the plaintiff appealed.

The appellant claims the property in dispute, under a probate sale of the estate of John Murdock, late of the parish of Feliciana. The appellee sets up a title, obtained under a sheriff's sale made in pursuance of an execution, which issued on a judgment rendered in the district court against the heirs of the said John Murdock. The suit was commenced in the ordinary form of a petitory action; and after the defendant appeared and answered, the plaintiff prayed leave to amend his petition, by suggesting nullity in the proceedings and judgment under which the defendant claims title. This amendment being allowed by the court, a bill of exceptions was taken to that proceeding, which requires examination.

[Murdock v. Browder.]

On the part of the appellant, it is contended, that an action, the object of which is to annul the judgment and sale under it, of the district court, should be commenced by all the heirs of John Murdock, and should have preceded any suit directly claiming the property alienated in consequence of a judgment pronounced by a court, alleged to be without jurisdiction. If the probate sale was considered in such a manner as to transfer to the plaintiff the right and title of all the heirs of John Murdock to the premises in dispute, he might legally pursue any steps in his individual right for his sole benefit in relation thereto—which, before such transfer, should have been prosecuted in right of all the heirs. There does not appear (to this court) to be any incompatibility in uniting in the same suit allegations of nullity, and a prayer to have the title, by which a defendant holds property, avoided and annulled; and one for the recovery of said property. We are, therefore, of opinion, that the amendment in the petition was properly allowed.

In proceeding to discuss the merits of the case, it is necessary first to inquire into the validity of the defendant's title—whether it be of such force as to require that he should be maintained in his possession of the property, against the claim of the plaintiff.

According to the evidence of the case, (as shown by the record,) it appears that John Murdock died intestate, leaving no heirs within the state of Louisiana; and that his estate was administered by a curator for some time, as being one known in our laws under the denomination of vacant. The administration of the curator ceased by the interference of one Samuel Murdock, who claimed the succession of John, as brother and heir in his own right in part; and also by virtue of a procuration from the other heirs, of whom the present plaintiff is one. Young, the curator, settled his accounts with the court of probates; and the property of the succession was considered to be in the possession of the heirs, &c. Two of them, viz. the appellant and Samuel Murdock, who were entitled to two-thirds of the estate, were of full age; and two others nephews of the deceased, inherited the remainder. The majors, after twenty-one, having accepted the inheritance without benefit of inventory on their part, left the state without paying the debts of the succession. The defendant in the present suit, who was a creditor of said succession, instituted a suit against them as heirs; and also against the minor heirs, by attachment, in the district court of the third judicial district, wherein all the defendants were represented by an attorney and curator, *ad hoc*, for the minors. Judgment was given for the plaintiff; and in executing it, the property now in dispute was sold by the sheriff, and acquired by the present appellee.

The judgment in the suit of Browder *v.* The Heirs of John Murdock, was rendered in such prayer, as to condemn each of them to the payment of his share of the debt claimed, in proportion to the extent of his right of inheritance.

These proceedings were clearly correct and legal, so far as they

related to the heirs of age; who had assumed that character without the protection of an inventory. By the acceptance of the inheritance, pure and simple, they became liable to pay the debts of the ancestor, proportionably to their interest in the succession; and, as they resided permanently out of the state, their rights in it were subject to be seized by attachment; and sold, after final judgment, in satisfaction thereof. They can not claim for themselves any benefit of nullity in those proceedings. Nor can they for the minor heirs, even admitting that, with respect to them, the judgment and subsequent proceeding on it, by which the defendant in the present action claims title, are void, (which is by no means clear.) Should the minors, when they become of age, desire to set aside the judgment or sale under it, to the prejudice of the appellees, they will only be authorised to pursue him successfully, on payment of their share of his claim on the succession of their ancestor. See 3 *N. S.* 674.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Buchanan, for the plaintiff.

Watts and *Lobdell*, for the defendant.

Overton *v.* Gervais. V, N. S. 463.

FIRST District.

With relation to the only point material to doctrine in this case, the Court say:

As to the application of the plaintiff, to have the judgment amended in relation to the interest, we think it ought to be allowed. It has been decided, a few weeks since, in the cases of Breedlove, Bedford & Robeson *v.* Jacobs, and Gouverneur *v.* Russel, that when the jury found a verdict, without interest, the court could not give it by the judgment. But in this instance, the verdict is for a certain sum, with interest. The question is, at what rate that interest must be calculated? and the answer to it must be, whatever interest the law, or the agreement of the parties, had established; for the jury must be presumed to have found, in relation to the obligations which the one or the other created. In this case the original contract, and the consent of parties, placed on record, had fixed it at ten per cent. from the time the first instalment became due. That interest must, therefore, be given in the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant, the sum of five thousand and ninety-nine dollars and ninety-five cents, with interest from the first day of January, 1825, at ten per cent. until paid, it being the balance due on the first instalment, with costs in both courts.

Priou *v.* Adams. V, N. S. 691.

An instrument purporting to be a copy, wanting the signature of the notary or parish judge, is not authentic: but if the original be offered, it cannot be refused.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff appeals from a judgment of nonsuit: the evidence he offered having been rejected:

His action is grounded on an authentic act. A copy offered was rejected, because the act did not appear to have been subscribed by Peter d'Aspit, the parish judge before whom it purports to have been executed.

It appears that H. Knoblock and Lewis A. d'Aspit, were the witnesses; and the act has the signatures of the parties, and of Knoblock—and L. A. d'Aspit adds the word "Judge" to his signature. It is, therefore, clear that the instrument wanting the signature of Peter d'Aspit, the parish judge, is not an authentic one, and the notarial copy does not render it so; nor its being entered on the minutes of the office: and the district judge did not err in rejecting the copy.

The plaintiff next offered in evidence, the original of this act, which was objected to as not being an authentic copy, but an original record. The objection was sustained, and the plaintiff took a bill of exceptions.

To complain of a creditor who offers an original title, instead of a copy, is to complain that the evidence is too strong. The copy is evidence, only because it is impossible or very inconvenient to bring the original. This point was determined upwards of ten years ago, by this court, in the case of Brandon *v.* Pollock *et al.*, 5 *Martin*, 613.

We there held, that originals from a notary's office could not be refused, because they ought to have remained there, and copies should have been taken.

But the rejection of the document was not erroneous, although made on erroneous ground. The plaintiff had declared on an authentic act, and ought not to be permitted to produce a private one; at all events, without praying its execution—and the defendant ought to have had notice, in order to prepare himself with proof to meet that of the plaintiff.

It is said, that the act being written on the notary's book, must be considered as registered. Be it so; but the registry does not make a private act an authentic act. This has been determined more than once.

It is, therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Augustin, for the plaintiff.

Wheeler, for the defendant.

EASTERN DISTRICT, MAY TERM, 1827.

Perrie *v.* Williams. V, N. S. 694.

In an action for damages for killing the plaintiff's slave, he may be permitted to strike out a charge of neglect in the defendant, in the management of his own farm.
A party cannot give his own conversation in evidence.

THIRD District.

MATHEWS, J., delivered the opinion of the court.

This is an action of trespass, in which the plaintiff claims damages for the loss of a slave which she alleges to have been killed by the defendants. They severed in their answers to the petition, and separate verdicts and judgments were rendered against them: Williams alone appealed.

Two bills of exceptions are found in the record, which must be disposed of.

The first is to the opinion of the judge *a quo*, by which he authorised the plaintiff to strike out a count in her petition, which related to the conduct of the appellant as overseer. The allegations in that part of the petition, had no relation to the trespass in which the slave was destroyed; but only charged the overseer with gross negligence and mismanagement of the plantation and slaves of the appellee.—It, in truth, was a declaration of facts—making an entire and distinct cause of action. This part of the suit was dismissed by leave of the court, after the cause was submitted to the jury; but not until Williams had been allowed to amend his pleas, by discontinuing a claim

[Perrie v. Williams.]

in reconvention for wages as overseer. Under such circumstances, and in pursuance of the Code of Practice, we are of opinion, that the court below did not err in permitting the plaintiff to discontinue that part of her suit which related to the neglect and bad conduct of the defendant as overseer, &c. See C. P. 532.

The second exception is, to the refusal of the court below, to allow the appellant's counsel to interrogate Doctor Bedford, a witness introduced by the plaintiff, as to a consultation which the defendant Williams had with the witness, w herein he exercised or palliated his neglect in not having sooner called in surgical aid to the slave while laboring under the wounds which had been inflicted on him by the defendant. This testimony was rejected on the ground, that no one can make evidence for himself. The rule is general: and we have not been able to discover any thing in the direct examination of the witness, which creates an exception to it in the present case.

As the cause was finally submitted to the jury, it presented a claim for damages, resulting from an unjustifiable violence and injury done directly to the property of the plaintiff. And the evidence appears to us, to justify the verdict and judgment of the inferior court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiff.

M'Caleb and *Byrnes*, for the defendant.

Abat v. Nolte's Syndics. V, N. S. 697.

If the bill of sale acknowledges payment of the price before the sale, and two days after the vendee give bills to the vendors, which are protested, the sale is not to be rescinded, even on an allegation of fraud, the vendee having no funds in the drawer's hands, if the latter were in the habit of accepting the vendee's bill.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to obtain a rescission of the sale of a lot of ground, situated in the suburb of St. Mary, which the plaintiffs allege was sold and conveyed by them to the insolvents, previous to their failure, and for which they received no consideration; and in consequence of fraud in the contract, pray the sale to be annulled, and the

property to be restored to them. Judgment was rendered in the court below for the defendants; from which the plaintiffs appealed.

The evidence of the case shews, that the lot in dispute, was conveyed, from the appellants to Nolte & Co. by a notarial act of sale, made on the 25th June, 1825; which contains an acknowledgment of the receipt of the price for which it was sold, as having been paid previous to the execution of the act of sale. Two days after, the purchasers drew a bill of exchange in favor of J. Abat, for the sum of 23,625 francs, on Hottengeur & Co. in Paris; which the plaintiffs allege was the only consideration given as the price of the property sold, and that it was given in fraud, and with an intention to cheat and deceive them; as the drawers had not at the time of making and delivering the bill, any funds in the hands of the drawees. The oral testimony, as exhibited on the record, raises a violent presumption, that this bill of exchange was in truth given and received, as the price of the lot; although the deed of sale acknowledges payment, two days before the date of said bill.

The principal, and perhaps the only question which arises in this cause, proceeds from the suggestion of fraud, in the manner of payment, practised by the vendees. If they acted in bad faith, and intended to deceive the sellers, by paying the price in a bill of exchange which they could not, by any fair calculations in the course of trade have expectedthe drawees to accept and pay, their conduct was fraudulent in a very high degree, and perhaps sufficient to violate and annul the whole contract, so far as they alone are interested in it. But the whole evidence shows clearly, from the nature of the correspondence, which existed between the house of V. Nolte & Co. and that of Hottengeur & Co. in Paris, that the former might have drawn on the latter in good faith, and in confident expectation of having their bills honored, at the period when the bill in question was drawn. It was probably owing to an event, disastrous in its effects, to many merchants of high standing, both in the United States and many parts of Europe, and which could not be or was not foreseen by the wisest among them, that the bill, which is now alleged to have been fraudulently impossd on the plaintiffs, was not accepted and paid. We have it in proof, in the present case, that the great and sudden diminution in the price of cotton, which took place in the markets of Europe, in the month of July, 1825, created a general alarm and distrust amongst merchants. It is true, as appears from the testimony of one of the witnesses, that V. Nolte & Co. had no funds in the possession of the drawees, at the time the bill was drawn; but they were in the constant habit of drawing in anticipation, on funds to be placed to meet their drafts. This, we believe to be a practice not unusual amongst merchants, who have been long in correspondence with each other, and where reciprocal credit has been well established, by a constant exchange of good faith and punctuality.

We, therefore, conclude that, in relation to the sale and transfer of the lot of ground in question, no fraud intervened, and that nothing

has been shown on the part of the appellants, which can legally invalidate the title obtained by the insolvents, and which has been regularly transferred to their syndics. The property must be considered as belonging to the estate of the bankrupts; and as such, liable to be disposed of according to law. Whether the plaintiffs may be entitled to any privilege on the price for which it may sell, as vendors, is a question not now to be settled.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Denis, for the plaintiff.

Eustis, for the defendants.

Beon *v.* Morgan. V, N. S. 701.

The share of a co-heir cannot be seized on an execution.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

In this suit the petitioner alleges, that she is the owner of a slave which was seized by the defendant, as sheriff, by virtue of a *fieri facias*, in the case of Waterman *v.* Beon. She claims title as heir to her mother, and in consequence of an amicable partition made in the state of Virginia, between her and her co-heirs, of whom Thomas Beon is one.

The defendant acknowledges the seizure, and states in his answer, that it was not under execution, but attachment. The object of the suit appears to be, to claim possession of the property, of which the plaintiff alleges she has been illegally deprived. The court below, in rendering judgment, seems to have considered the seizure as having been made, by authority of an execution, and ordered that the slave should be restored to the plaintiff; and from the judgment thus rendered, the plaintiff appealed.

Whether the seizure and detention were made in pursuance of a writ of attachment, or *fieri facias*, can not affect the decision in the present case, which may well be considered as a possessory action.

The judge *a quo*, declined giving any opinion in relation to the exclusiveness of the plaintiff's title, believing (it is presumed) that the situa-

tion of the parties to this suit, does not authorise a final adjudication, on the alleged partition. In this we think he was correct. Whether the appellee be sole or joint owner of the slave which was seized, she can not in our opinion, be legally deprived of possession, in the mode pursued by the defendant. If the seizure was made by *mesne* process of attachment, nothing more was attachable, than such interest as the defendant, in that proceeding, might have as co-heir, in property which was common to him and the present plaintiff; and the latter ought not to have been ousted of her legal possession.

If the property was taken under execution, the measure was illegal; because the undivided share belonging to a co-heir, in a succession, can not be seized on execution, &c.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Moreau Lislet, for the plaintiff.

Watts and *Lobdell*, for the defendant.

Turnbull *et al. v.* Freret. V, N. S. 703.

An executor may novate a debt of the estate.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action on a promissory note, made so far back as the year 1802.—The defendant pleads a discharge under the insolvent laws of the late territory of Orleans, dated in the month of January, 1806. There was judgment in his favor in the court of the first instance, and the plaintiff here appealed.

The argument at the bar, has principally turned on the regularity and effect of the proceedings under the *cessio bonorum;* which are pleaded as a bar to the action. The strongest objection urged against them, is the want of the plaintiff's name on the *bilan;* and the consideration of this objection, draws our attention to the point on which we think the merits of the case rest.

The note on which the suit is brought, is in the following words: "Good for five thousand six hundred and forty-three Spanish

milled dollars, payable on the first day of January next, to the order of Mr. Charles Norwood, executor of Messrs. Trumbull and Joyce, for balance due to the said estate.—New Orleans, 1st January, 1802.

(Signed) JAS. FRERET."

Norwood was placed on the bilan as a creditor; but the plaintiffs insist that the insertion of his name there did not bind them. That it was their debt, not his; and his year of executorship had expired at the time the defendant failed.

Whether it was his debt, or theirs, depends on the effect which should be given to the note already set out. If it produced a novation of the debt due to the ancestors of the plaintiffs, then Norwood, the executor, was the creditor.

Should it appear that the executor had authority to novate the debt, we are satisfied he did so, by taking a note payable to himself or order. The defendant then owed him, or the person to whom he might endorse it. The words, as executor, can be considered in no other light, but as words of description. That point has more than once been decided in this court, in reference to obligations which can not be distinguished from that now before us. It is beyond doubt, that if Norwood had sought to enforce payment from the defendant, he might have pleaded in compensation, any debt which the payee owed him. 5 *Mart.* 201; 10 *Ibid.* 463.

It is, however, contended, that the executor had no authority to novate the debt—that a general power was not sufficient for that purpose—that it should have been special.

This court thinks differently. A tutor, executor, or any person having a general procuration, may make a novation. The rule of the Roman law was, that whoever had a right to receive payment, had a right to novate. *Cui recte solvitur, is etiam novare potest.* There was an exception to the rule, where the agent had only a particular power to receive; because *non debet egredi finibus mandati.* But wherever the authority was general, the right existed. *ff. liv.* 46, *tit.* 2, l. 10, and 29, *sect.* 1. *Pothier on Ob.* 555, 556, 557.

It was urged, that the heirs might, if they chose, approve of this act of the executor, receive the note from him, and bring suit against the debtor. This is certainly correct. They may do so. But then they must sue in the name of the person to whom the note was made payable. The legal title to receive the money is vested in him by the novation; and the heirs cannot pass it by, and commence an action in their own name.

This course has not been pursued here, and it will be time enough when it is resorted to, to examine whether the discharge which the defendant obtained under the insolvent law is binding on Norwood.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiffs.

Grymes, for the defendant.

Fluker *v.* Turner. V, N. S. 707.

THIRD District.

He who has an interest in a judgment, without being a party on record, cannot control the execution.

EASTERN DISTRICT, MAY TERM, 1827.

CONTINUED.

Bore *v.* Bush *et al.* VI, N. S. 1.

FOURTH District.

The plaintiff has a right to put his case to the jury, and cannot be nonsuited by the court contrary to his will.

A justice of the peace derives no protection from his official capacity, when he does not act within his jurisdiction.

Free persons of color are entitled to a trial by jury, and can not be tried for offences by a justice of the peace. See 1 *Martin's Digest*, 688, 100, 648, 46.

Parish of Orleans *v.* Morgan. VI, N. S. 3.

When the judgment of a criminal court is the foundation of a civil suit, it may be given in evidence thereon.

When such a court, without exceeding its authority, directs the payment of a fine, it cannot be decreed to another person while the judgment remains in force.

A jjudgment under the third section of the Act of March, 27th, 1823, ought, perhaps *must* direct, that the fine should be paid to the Hospital as the act directs.

FIRST District.

PORTER, J., delivered the opinion of the court.

The Criminal Court of New Orleans, rendered the following judgment in the case of the "State *v.* Chardon." "The defendant Joseph Chardon, being in court, as aforesaid, and having nothing to offer, why sentence of the law, on the verdict of the jury, should not be passed on him. Therefore, ordered by the court, that the said Joseph Chardon, for his offence aforesaid, be, and he is hereby sentenced, in virtue of the third section of an act, entitled, 'An act for the relief of the Charity Hospital, of New Orleans, approved March 27, 1823,' to pay a fine of one thousand dollars, to the benefit of the Charity Hospital, and be imprisoned for the space of thirty days, to pay the costs of prosecution, and stand committed until the said fine of 1000 dollars and costs of prosecution be paid. June 14th, 1826."

The 3d section of the act referred to in this judgment, after directing that a certain number of gambling houses might be licensed in New Orleans, and prohibiting the opening of any other, declared that any person acting in contravention of this act, should be prosecuted by the attorney-general, and should, on conviction thereof, be condemned to pay a fine which should not exceed 1000 dollars, to the benefit of the Charity Hospital, and to an imprisonment, which should not exceed six months, nor be less than thirty days.

By the 26th section of the act to organise the city court, passed the 18th February, 1825, it is enacted, that all fines imposed by the criminal court, of the first district, shall be for the benefit of the Parish of Orleans.

Under this law the inhabitants of the parish, claim the fine imposed, by the sentence of the criminal court. In the petition they state, that the money has come into the hands of the sheriff, and they pray that he may be directed to pay it over to them.

The Charity Hospital, who intervene, aver, that they are entitled to the fine, in virtue of the sentence of the criminal court.

[Parish of Orleans v. Morgan.]

The defendant pleads, that he is but a stakeholder; and submits by his answer to the court to decide, which of the parties he should pay.

The court below gave judgment in favor of the Parish, and the Charity Hospital appealed.

The most important question in the cause, is the effect of the judgment of the criminal court. The general rule is, that judgments in criminal cases are not evidence in civil actions. But where the judgment in the criminal court, is the foundation of the civil suit, then an exception is necessarily presented to the rule. For if that judgment cannot be evidence for the defendant, it must be equally inadmissible as evidence for the plaintiff, and consequently the latter would be without any cause of action. It is true, however, that if, in one part of the judgment, the court acted on matters of which it had jurisdiction, and in another, exceeded its power, a party claiming the benefit of that part, of which the court took cognisance, could not be concluded by another branch of it, in which the judge wanted jurisdiction *ratione materiæ.*

It is the application of this principle, that has created the greatest difficulty in deciding this case. The criminal court had, clearly, authority to fine and imprison the offender; but it is contended, that it had no power to decide between the two parties, who set up a claim to that fine: that this claim though originating in matters cognisable by a court of criminal judicature, became, as soon as judgment was pronounced, one of a purely civil nature.

The point is certainly not free from difficulty; and it is one of the first impression, at least, our researches have not enabled us to discover, that any thing of the same kind, has been heretofore agitated and decided. We have looked into the English books for information, as to the judgments which their courts then sitting, for the trial of offences, pronounce in similar cases, and though the subject is not treated with the clearness we could have desired, it appears to us that the judgment may be either general, leaving the fine to be distributed according to law, or it may be special, and declare who it shall be paid to. 1 Bac. Ab. 69; 2 Hawk. P. C. 397; 4 Burrow, 20, 18.

Under the statute by which this fine was imposed, the authority of the court to direct how the money to be levied from the offender should be paid over, is less doubtful, than it would be on general principles. It directs, that the party shall be condemned to pay a fine, to the benefit of the Charity Hospital. A judgment in obedience to this law ought, nay, perhaps, must direct, that the fine should be paid to the Hospital, as the act directs.

Believing, therefore, that the court below, did not exceed its powers, in ordering how the fine should be paid, we cannot, while that judgment stands unreversed, direct that the money be paid to another.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged and decreed, that the defendant, Morgan, pay

[Parish of Orleans v. Morgan.]

over to the interpleaders, the Charity Hospital, the moneys in his hands arising from the fine imposed, by the criminal court, on Joseph Chardon, and that the plaintiffs pay costs in both courts.

Moreau, for the plaintiffs.

Morse, for the defendant.

Buquoi v. Hampton. VI, N. S. 8.

FIRST District.

Every variance, in point of time, between the allegation and the proof is not fatal.

A clause in a contract, that differences arising under it shall be settled by arbitrators cannot be urged at the trial, if not pleaded.

Cucullu v. Orleans Insurance Company. V, N. S. 11.

Under a warranty against seizure for illicit trade, the insurers are not released from liability for illegal seizure and detention. And this principle applies as well, where part of the cargo is illegally, and part rightfully seized.

FIRST District.

Porter, J., delivered the opinion of the court.

This case, which is now before us, after a rehearing, is the same in all its parts, as that of the same plaintiff against the State Insurance Company, which lately underwent so much discussion in this court, except in relation to a billiard table, which was expressly excluded

from the general condemnation pronounced against the rest of the cargo.

The policy of insurance contains an exception, "warranted free from any charge, damage or loss, which may arise in consequence of engaging, or having been engaged, in illicit trade."

The defendants contend, that the seizure of this part of the cargo was caused by the plaintiff being engaged in an illicit trade, in respect to other portions of it; and that they are protected by the warranty, already stated.

The insertion of this clause of warranty, is comparatively a modern date in policies of insurance, and the decision of courts in relation to it, are, as yet, neither very numerous, nor satisfactory. By some it has been held, that the insurers are liable under this exception for a loss by seizure, under a pretence of illicit trade—when, in fact, no such trade has been carried on, or attempted. By others, that the insurers are not responsible for seizure, when the goods are afterwards acquitted.—See 13 Johns. Rep. 161; 11 Mass. Rep. 107; Marshall, 346; Phillips on Ins. 293, 294, 295.

If the whole cargo had been illegally seized without sufficient cause, and afterwards released, we should have been clear the assured might recover under the clause in the policy, by which they were protected against the arrests and detainments of foreign governments. The warranty under any fair view of its meaning, or the intention of the parties, can not be construed to extend further than to protect the assurers against illicit trade actually carried on, or attempted; not against arbitrary arrests, made on a pretence that there was illicit trade, when, in truth, no such thing existed. The language used, repels any such construction. It warrants against illicit trade; not against what others, for their own convenience or interest, might choose to denominate such, when they make the seizure. If the intention of the parties had been to exclude irregular detainments from the risk, we can not suppose they would have expressed this idea by using the words, "engaging or being engaged in illicit trade;" for these expressions suppose the fact to exist, and the interpretation for which the assurers contend would discharge them, whether that fact existed or not. We see nothing in the reason of the thing; and we know of no rule of construction, which would authorise such a latitude to be taken, in opposition to the plain language used in the contract.

The doubt with us has been, whether this principle can be applied where part of the cargo is illegally, and part rightfully, seized. Opposed to it is the argument of the defendants, that the loss occurred in consequence of the plaintiff's being engaged in an illicit trade. Still we are unable to see any satisfactory reason by which the cases can be distinguished. The loss warranted against, was that which should result from a violation of the laws of the country where the goods were to be carried: not against illegal arrest or detention. Nothing has been shown in the laws of Mexico, which authorises a

seizure of a lawful portion of a cargo, because other parts of it are unlawful. The sentence of acquittal negatives the idea that any such exist; and is, in fact, an acknowledgment that the seizure was improperly made—it being a perfectly well settled principle, that a decree of restitution is conclusive evidence of a tortious seizure. The possession, therefore, which the officers of the customs took of the goods, can be considered in no other light, but as an act of illegal arrest and detention; and of such acts we are clear, the clause of warranty did not throw the risk on the assured.—*Curia Phillip. lib.* 3, *cap.* 10; *Pena de comiso, No.* 3; 13 Johns. 141; 2 Wheaton, 1; 3 *Ibid.* 312, 320.

The former judgment of the court, therefore, must be so modified as to enable the plaintiff to recover the amount of the property already mentioned: and it is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendants, the sum of four hundred and eighty-two dollars, with costs in both courts.

Strawbridge, for the plaintiff.

Eustis, for the defendants.

Ramsay *v.* Livingston. VI, N. S. 15.

Members of congress enjoy no other privilege, in civil cases, than exemption from arrest.

A curator may be appointed to an absentee, in the service of the public.

If a transfer be written on the back of a note, but not signed, and the note remains in the payee's hands, the transfer must be considered as inchoate.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The defendant being a member of the House of Representatives of the United States, and in attendance on Congress, the plaintiff, on the sheriff's return that he was not to be found, had a curator *ad litem*, appointed for him.

This gentleman neglecting to answer, judgment by default was taken, and on his motion set aside, and several months were given him to correspond with the defendant. At the expiration of these,

no answer being filed, judgment by default was again taken and set aside.

Finally, the curator pleaded that the defendant was not an absentee in the sense in which that word is used in that part of the Code which treats of the appointment of curators. The general issue was also pleaded. There was judgment for the plaintiff, and the defendant appealed.

We are not aware that members of congress enjoy any privilege or exemption in civil cases, other than the absolute freedom of their persons, *eundo, morando et redeundo.*

In the appointment of a curator it does not appear to us that the judge ought to be influenced by the absence being on public service.

If a citizen goes to Canton, as Consul of the United States, and the person in whose charge he left his estate here die, the absence of the former on public service, is surely no reason why his estate should be left unprotected; and a curator must be appointed, if necessary. So it is with the estate of a citizen absent on any other account.

But curators are appointed, at times, for the interest of the absentee; at others, for that of his creditors, when he leaves his concerns in such a situation that those creditors cannot establish their claims or enforce payment. In such a case, justice as forcibly requires the appointment of a curator to a citizen absent on public duty, as to any other person, unless our laws have provided a particular privilege or exemption in favor of the former. We are not aware that they have.

By *Partida* 3, 2, 12, if a debtor be in captivity or absent, his creditors may require that a curator be appointed, against whom suits may be instituted.

By the old Civil Code, 15, art. 8, the judge before whom a suit is pending, in which an absentee is directly or indirectly interested, is to appoint a person to defend his rights, if he be not otherwise represented.

This, perhaps, might be said to extend only to suits pending, not to those to be instituted; but the New Code puts this beyond all doubt, and directs the appointment of a curator *ad hoc*, "if a suit be instituted against an absentee." Now a suit is instituted by the mere filing of the petition, and taking out process. The French part of the Code is more particular, "*si l'on a forme une action.*"

On this part of the case we are with the plaintiff.

On the merits, it is urged that the payee of the note, the plaintiff, parted with his interest in the note, and consequently cannot maintain a suit thereon, without showing that it was re-transferred to him, or that he otherwise re-acquired it. The evidence of the fact thus alleged, is shown by an endorsement on the back of the note, stating that it was transferred to another person, without any recourse on the original payee. But the record shows this transfer was not

signed, and while the payee remains in possession of the note, the transfer must be viewed as inchoate.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Hoffman, for the plaintiff.

Smith, for the defendant.

Sarapure *v.* Debuys. VI, N. S. 18.

A mother has no right to purchase property for her minor child.

A minor can neither alienate, nor purchase property, without the authority of justice.

But on his coming of age he may ratify an acquisition or alienation of property made for him during his minority.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action to enforce a lien, which the plaintiff states she had on property that the defendant, or those under whom he holds, purchased from her mother. The lien is stated to arise from the mother having received, as tutrix, the inheritance which the petitioner derived from her deceased father, and from her having failed to pay it over.

The defence assumes several grounds in the answer. But in the argument in this court, it has been narrowed to what the evidence shows is the real gist of the contest, namely, the effects of a sale made by order of the court of probates.

The defendant insists that the property on which the tacit lien or mortgage is now sought to be enforced, made a part of the estate of the father; that it was sold by a decree of the probate court, under which it was purchased by those from whom he acquired it, and that consequently the mortgage existing on it, in favor of the plaintiff, and the other heirs of the ancestor, was extinguished.

The plaintiff admits that a probate sale of the estate left by the father, would have that effect, but she contends that the house and lot on which she now claims a lien, was not the property of the father but that of the mother, and that as she was alive at the time, no such effect follows the alienation made by order of the court of probates.

The positions which both parties have assumed, in respect to the law, are correct. The question, therefore, for our decision, is one of fact.

From the evidence produced, it appears that some time before the dissolution of their marriage, the father and mother of the plaintiff removed from this country to France, and that previous to their departure they sold all the movable and immovable property which they possessed. The father having died in Europe, the mother returned to this state. Previous to an inventory being made of the property in common between them, she purchased two lots; one of which is the subject of the present suit. When the notary made the inventory she presented these lots as making a part of the succession of her deceased husband, and repeated the declaration several times; but also stated that they had been acquired by her since his decease. They were inserted in the inventory as common property, acquired by the wife, since the decease of the husband, and sold as making a part of the succession.

The only way in which the court can understand and reconcile the evidence, is, that the widow, after the decease of her husband, purchased, with the community funds, this property, and that supposing she had a right to do so, and that the children had an equal interest in it with herself, she presented it to be inventoried, as making a part of the estate.

But it is clear that the mother had no right to make this purchase on account of her children, to whom she was tutrix. Minors can neither alienate nor acquire property, without the authority of justice. *Febrero, vol.* 2, *cap.* 4, *sect.* 2, *no.* 61.

It is, however, equally clear, that the minor after he comes of age may approve, either of the alienation of his estate or the purchase made for him; and if he does any act which amounts to such approbation, the contract is as binding on him as if made at the age of majority.

The only doubt we have had in this case, was whether this approbation was not shown here. The amount of the inventory is 17,291 dollars 50 cents; and this sum is formed in part of the very property on which the petitioner seeks to enforce her mortgage. The judgment of the court of probates establishing her claim against her mother assumes this sum of 17,291 dollars 50 cents, as the amount of the community property. It is evident therefore that the value of this lot was taken into consideration by the court in fixing the sum due by the mother.

It appeared to us, therefore, on the first examination of the case, that the plaintiff could not claim the value of this lot as making a part of her father's estate, and at the same time claim a lien on it as belonging to her mother. But a close examination of the evidence does not enable us to assume this position. The pleadings in the suit before the court of probates have been produced, but the proof there adduced, has not. It appears from the former the petitioner alleged that the father left a large estate which came into her mo-

ther's possession. Whether the inventory was produced in evidence or not, we cannot say, though there is a strong presumption it was, from the judgment adopting it as the amount of the estate in common between father and mother. But in giving the defendant the benefit of that presumption, we cannot refuse to the plaintiff the benefit of another, that it was introduced to support the allegations in the petition, which were, that a large estate had come into the mother's hands. Of the fact, the inventory was evidence, though it had all been composed of property purchased by the mother, with the funds of the estate, when it contained her declaration to that effect. And what is conclusive of this being the purpose for which the instrument was introduced, is, that the rights of the minors are ascertained, by reference to what the property was estimated for, not what it was sold at. Now, if it had been considered as making a part of the father's estate, they could only have had the price which it brought at auction.

But there is evidently an error in the judgment of the district court, one into which it was led by a mistake in that of the court of probates. The latter declares that the property in community was 17,291 dollars 50 cents. That the father's share was 8745 dollars 75 cents, after deducting the costs, amounting to 1000 dollars, and that the plaintiff was entitled to the one-sixth of the sum last mentioned, namely 2715 dollars 25 cents.

In this calculation there are two errors: First, the father's share, after deducting 1000 dollars out of 17,291 dollars 50 cents, is only 8145 dollars 75 cents; and secondly, the one-sixth of this sum is not 2715 dollars 25 cents, but 1357 dollars 62½ cents.

No appeal has been taken by the persons cited in warranty, in regard to whom there is a separate judgment on record. The reversal, therefore, which we are about to pronounce, will only extend to the decree rendered between the parties before us.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the defendant pay to the plaintiff, within ten days after the notification of the judgment, the sum of 1357 dollars 62½ cents, with the costs of this suit, in the court of the first instance, and on the neglect or refusal to pay the same, that the premises mentioned in the petition be seized and sold for the payment of said sums; and it is further ordered, adjudged and decreed, that the appellees pay the costs of appeals.

Hennen, for the plaintiff.

Derbigny, for the defendant.

Millaudon *v.* The Judge of the Parish of Jefferson. VI, N. S. 24.

PARISH Court of Jefferson.

The Supreme Court cannot give relief against the imposition of a fine of forty dollars.

Pattin Abadie *v.* Poydras. VI, N. S. 26.

The imputation of a payment is by law made to the most onerous debt, as to a mortgage, when there are other ordinary debts.

FOURTH District.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff obtained an injunction to stay proceedings on an order of seizure which the defendant had caused to be issued against certain slaves mortgaged to him in the year 1814, to secure a debt due from the former, which in 1816 amounted to the sum of 5699 dollars 57½ cents, according to a settlement of accounts which took place between the defendant in the injunction, and the husband of the plaintiff. The cause was submitted to a jury in the court below, who found a verdict for the plaintiff, and judgment being rendered in pursuance thereof, the defendant appealed.

The evidence of the case shows that the appellee executed the mortgage on which the order of seizure was granted; that the debt which it was intended to secure was taken into the estimate of accounts between the applicant and the plaintiff's husband, in a settlement made on the 26th of March, 1816, at which time a payment was made by the latter, amounting to 4362 dollars 87½ cents, with the funds of the appellee's wife. According to the statement then made, the whole amount due by Abadie and wife to the defendant, was 8949 dollars 95½ cents. Subsequent to this arrangement, viz:

in the year 1823, the plaintiff sued for and obtained a separation of property from her husband; and in rendering judgment in that case, the sum which had been previously paid over to the appellant by her husband was included, estimated at 5000 dollars. These are the principal facts in the case, and those alone worthy of consideration on its decision. From them, two questions arise; the first relates to the imputation of the payment made on account in 1816, the second, to the effect on the rights of the appellee, which her claim and consequent judgment agaist her husband, can have.

Admitting that the debt owing by the appellee and secured by the mortgage on which the seizure was obtained, forms the first item in the account, as regulated and settled between the husband and the appellant; and that the payment made on that occasion, was with the funds of the mortgager; no doubt can be entertained of its legal imputation, in the absence of any positive stipulation in relation to its appropriation. Had the debts, as stated in that account, been those of the husband alone, and he had used the funds of his wife in payment, the doctrine of imputation of payments would have found no place in the present action. But it appears that the separate debt of his wife, joint debts of husband and wife, and those perhaps of the husband alone, were also blended together in the adjustment of that account. The payment must therefore be considered in relation to all the items; and as it was not specified, which the parties to the settlement intended to extinguish, it should be imputed according to the provisions of law made for such cases, and which are found in the old Code, 290, art. 156. The debt due on the mortgage was certainly the most onerous in the catalogue of settlement; and in discharge of it, the sum paid ought legally to be imputed. By the payment it was extinguished *pro tanto*, and could never afterwards be revived, unless by express consent of the original contracting parties.

If this proposition be true, it solves the second question in the case, which has relation to the effect produced by the judgment obtained against the husband by his wife in her suit for separation of property. In that judgment, she had probably no right to be considered as a creditor for the amount of funds which her husband had received, as belonging to her, coming from the succession of her mother, for the sum thus received had been previously appropriated to the payment of a debt which she justly owed. But that it had been so appropriated, there is no evidence to show that she had any knowledge. It was the duty of her husband in that action to have shown the use which he had made of the funds in defence of the claims set up against him; and if his wife's claim and his acquiescence were productive of fraud, it affects all his creditors, and not the defendant in particular; certainly not in such a manner as to revive a debt which had been long before extinguished by payment.

But the amount paid was not equal to the hypothecary debt, which was, with interest calculated at the time of payment, 5699 dollars 57¾ cents, when the whole sum paid was only 4362 dollars 87½ cents.

[Pattin Abadie v. Poydras.]

The mortgage by which the sum of 5181 dollars 43 cents is secured, contains no stipulation for the payment of interest; and the defendant in the present suit, in his petition to obtain an order of seizure, claimed only 4587 dollars 7½ cents, being the balance due on said mortgage, after deducting 1112 dollars 50 cents, a surplus which remained out of the payment made in 1816, according to the imputation contended for by the appellant. That payment must, however, as we have already expressed our opinion, be imputed, *in toto*, to the extinguishment of the debt due on the mortgage, being 5181 dollars 43½ cents, from which deducting the total amount paid, 4362 dollars 87½ cents, a balance remains due to the mortgage creditor, amounting to 877 dollars 56 cents; and as to this last sum, the proceedings on the order of seizure are improperly enjoined.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the injuction obtained in the present case be dissolved, so far as it relates to the sum of seven hundred and seventeen dollars and fifty-six cents, and that it remain and be made perpetual for the sum of four thousand three hundred and sixty-two dollars eighty-seven and a half cents, being part of the whole sum claimed by the present applicant and defendant in his petition for the order of seizure. And that the appellee pay the costs of this appeal, the appellant paying those of the court below.

Derbigny, for the plaintiff.

Cuvillier and *Seghers*, for the defendant.

Duncan's Executors *v.* Hampton. VI, N. S. 31.

The exception in the *Partidas* in favor of women who become widows before they are of age, in regard to estates inherited from their children, is unrepealed by any act of the legislature of the state or late territory.

The new Code cannot affect any contract anterior to its promulgation.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

The plaintiffs in this case set forth two distinct causes of action, on which they claim a recovery of the amount stated in their petition. The first is for money paid to the testator, as endorser on certain

notes alleged to have been made by the defendant through the ministry of his agent and attorney, in fact, in consequence of a transaction or compromise which took place between him and certain creditors, with whom difficulties existed in relation to the payment of the price of a tract of land. The second is to obtain restitution of sums of money advanced by the testator in payment of debts due by the defendant, and which were paid for the benefit of the latter.

The court below gave judgment in favor of the plaintiffs for 8750 dollars with interest; from which the defendant appealed.

The principal facts of the case as shown by the evidence are as follows: On the 25th of January, 1817, the defendant purchased from Louisa De Armas, wife of Carlos De Armas, a certain tract of land for the price of 12,500 dollars stipulated to be paid by annual instalments, accruing from the date of the act of sale, which was passed before a notary and made by and with the consent and approbation of the husband, who signed it together with his wife. The first instalment appears to have been paid. When the second became due, payment was withheld, and suit being brought to recover it, the defendant resisted the claim on the ground of imperfections in the title which he had acquired to the property, as having been sold without authority or power in the vendors to transfer, being in contravention of the wife's dotal rights. In that case the district court gave judgment for the plaintiffs, which, on appeal, was reversed.

While matters were in this situation between the sellers and purchaser of the land, the compromise as set forth by the plaintiffs in the present action, took place by the agency of R. Clague, for and on the part of the defendant; whose authority the latter disavowed, so soon as the transaction came to his knowledge.—Some time after these occurrences, application was made to the Supreme Court to suspend any final decree in the cause of De Armas and Wife *v.* Hampton, which by consent of the parties was done, and also, in consequence of consent, the appellants were permitted to withdraw their appeal. See 8 *Mart.* 432. Another appeal was subsequently taken for a similar judgment of the district court, which was finally affirmed. See 11 *Mart.* 552. After this affirmation (as is now shown to the court) the amount of money claimed in that suit, with interest and costs, was paid into the court below, and eventually came into the hands of the testator.

From this statement of the case, it is evident that no question remains in relation to the first and second instalments of the price of the plantation purchased by the defendant as above indicated. There is no evidence of any power or authority from the defendant granted to Clague, who assumed to act for him in the alleged transaction or compromise; no act showing a subsequent ratification, but on the contrary, an express disavowal of every thing which was done under that assumed agency. The appellant is therefore most clearly free from all obligations created by the stipulations of that compromise.

The sole question of importance in the case arises out of the pay-

ment, made by the testator of the appellees, of the two last instalments.—Their right to sue for the benefit of his succession is questioned, but we do not doubt on that subject. The will, according to a just and rational construction, gives them power to collect the debts which might be owing to the estate of their testator. In the receipt of debts they are authorised to act jointly and severally. The grant of authority to receive debts, without power in the executors to enforce payment, would be wholly illusory, and defeat the evident intention of the testator.

In examining the principal question, we must inquire: 1. whether the debts of the defendant were paid by the deceased during his lifetime, which were justly due and owing, and payment of which could have been legally enforced by the creditors? 2. whether the payment was made under circumstances such as authorise a recovery of the amount paid, as having been advanced for the use and benefit of the appellant?

According to the act of sale which took place between Mr. De Armas and the defendant, for the land as above stated, the latter bound himself to pay on the 25th of January, 1820, 3750 dollars, being the last two instalments of the price agreed to be paid for said land.

The act of sale has not in any manner been cancelled or annulled, but remains in all original legal force and effect. At the time the pretended compromise was entered into between the parties to the deed of sale, through the agency of R. Clague on the part of the defendant, which took place in August, 1819, the second instalment was unpaid, and then formed the basis of litigation, in which the right of the vendors to recover payment was in contestation. The final decision in that case, and the appropriation of the money recovered has already been stated. It is in proof in the present case, that the balance of the price of the property purchased by the appellant, as above set forth, has been paid to the seller by the plaintiff's testator.

The testimony which establishes this fact, was given by the husband of the person who sold the land, and had joined in said sale as an evidence of his permission and authorisation to his wife to sell.

This witness was objected to by the counsel for the defendant as being incompetent on account of interest, and a bill of exceptions is found on the record, to the opinion of the judge *a quo*, which allowed him to testify. He appears to us to be wholly disinterested in relation to the fact of payment having been made by the testator, as alleged in this case; or, if any kind of interest exists, it is opposed to the witness, as his testimony amounts to an acknowledgment of satisfaction of a debt due to his wife, or to himself and her jointly.

We, therefore, consider that proof of payment, as alleged in the petition, has been made. In proceeding further on the first inquiry, it remains to be ascertained whether the debt thus paid, amounting to 5000 dollars, was one which could have been legally exacted from the defendant. It certainly stood in a situation precisely similar to

that which was recovered in the suit of De Armas and Wife *v.* Hampton, by a final judgment of this court as seen in 11 *Martin*, 552, above referred to; and if that judgment be correct, on legal principles, no doubt could be honestly entertained of the appellant's liability to pay the subsequent instalments. But the correctness of that judgment has been assailed on various grounds which must be investigated. Before proceeding to this investigation, we deem it not improper to remark, that there would be nothing very surprising in the occurrence, if the court had been led into error in that case, as both parties to the suit evidently desired a decision which should pronounce the sale valid in law, and completely translative of property; and a decree for the payment of the price. We however believe that there is nothing erroneous in the decision of the case. The difficulty which appeared in the cause when it was first brought before the appellate court, arising from the marriage contract of the plaintiffs, was subsequently overcome by showing that the contract had not been recorded in pursuance of the act of 1813, and consequently, was without effect in relation to the rights of third persons. The land which was sold and conveyed to General Hampton, was represented to have been the common property of Mrs. De Armas, the seller, and her child by a former marriage, and which she had acquired by adjudication of the succession of her first husband.

In the present case, the fact of the property having been held in common by the mother and her son is contradicted, on the ground, that as her share of the estate accrued in consequence of the death of a child, from whom on general principles she would have inherited; yet by her second marriage she lost the full right of inheritance, and only took a usufructuary interest. In support of this doctrine, the appellants' counsel rely on an act of our old Civil Code, 227, found at page 258, and which is retained in the New Code, art. 1746. It is true that these laws contain an exception to the general rule of inheritance by ascendants. But it is an exception which existed under the former laws of the country, and which appears to have its exceptions also, unrepealed by any act of legislation since the country came under the dominion of the United States. One of these exceptions to the exception is created in favor of women becoming widows before the age of majority, although they should marry a second time, and under its protection Mrs. De Armas rests, as shown by the testimony of this case, for she was not of age at the death of her first husband. See *Febrero, Part.* 1, *chap.* 3, *no.* 2.

After the death of one of her children, having only two, it is clear that the mother and surviving child held the succession of her first husband in common, which was adjudged to her in pursuance of the provisions of an act of the legislature, passed in 1809. See 3 *Mart. Digest*, 126. This law declares, that an estate thus adjudicated shall remain specially mortgaged to secure payment either to the minor or to his curators. According to this proviso, a tacit mortgage is created and exists on all property adjudicated under that act. And the ex-

istence of such mortgage on the property in the instance before the court, is offered as an objection to the propriety and legality of the payment made by the testator of the plaintiffs under pretence of benefiting the defendant. It is insisted that the latter would not have been bound to pay to De Armas and wife, unless under security against the probable or possible effects of said mortgage on the property sold. The doctrine as contended for by the appellant is that which some of the early decisions of this court seem to teach, particularly that given in the case of Duplantier *v.* St. Pé, 3 *Martin*, 236, But the principles assumed in those decisions have been eventually overruled by that rendered in the case of Fulton's Heirs *v.* Griswold, reported in 7 *Martin*, 223. It is believed that no doubt has been entertained by the court, of the correctness of that judgment, so far as it relates to the practice of setting up, in defence of payment, outstanding titles to land. With regard to mortgages actually existing on property sold, whether they ought to be successfully opposed to payment of the price, without security, has been doubted, and in case of insolvency of the sellers, might still have been reasonably doubted, were it not that these matters have been settled by the Code art. 2535. This law being posterior to the sale made from De Armas and wife, or rather from the wife to Hampton, can have no influence on the present case. And the law, as it previously existed, according to the exposition given by the decisions of the Supreme Court, would not warrant a detention of the prices stipulated to be paid for property, unless the buyer should have been disturbed by an action actually commenced, either hypothecary or in *revendication*. We therefore conclude that the appellant was bound to pay to the seller of the land the last two instalments of the price, at the time when they became due, and that as they were paid by the testator, his executors have a right to recover, in the present suit, the amount so paid with legal interest; unless there be something in the manner of payment which destroys their rights. This leads us to a short investigation of the circumstances under which payment was actually made. It is true, that Duncan, the testator, paid to De Armas and Wife, under a direct and immediate influence occasioned by his endorsement on notes which were executed in virtue of a void transaction. But the consideration for which these notes were given was a part of the price of the plantation which had occasioned much litigation; and the endorser, by paying the notes, paid that part of the price which was then owing and due. It was, therefore, *sub modo*, a payment for the benefit of the purchaser, and which, in justice and equity, and according to law, he is bound to refund. See *Curia*, p. 383, No 4, and *Part.* 5, *tit.* 12, law 32, and *tit.* 14, law 3. If any doubt could remain of the consistency of the opinion now expressed, with the jurisprudence of the country, as it existed previous to the adoption of our last Code, in relation to the liability of purchasers, to be compelled to pay the price of property encumbered with tacit mortgages, without requiring security against the effect of liens of that nature,

such doubt is much weakened, if not entirely removed, by reference to a positive enactment of the legislature, relative to a branch of the same subject. We allude to the act of 1817, in relation to sales made under execution, wherein it is declared that a purchaser of property at sheriff's sales cannot refuse to pay the price, on account of the existence of a general or tacit mortgage, unless a suit be actually commenced and pending against the property thus encumbered.

The right to recover interest on money due for the price of real property or such as is capable of producing fruits, has been so long settled that we should have deemed it unnecessary to mention the subject, were it not for the opposition made by one of the counsel for the defendant in the course of his argument. There has been no variance in the decisions respecting interest since the case of Segur's Syndics *v.* Brown, reported in 3 *Martin*, 91.

The judgment of the district court is erroneous in allowing too much to the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that it be reversed, avoided and annulled; and it is further ordered, adjudged and decreed, that the plaintiffs and appellees do recover from the defendant and appellant the sum of five thousand dollars, with interest at the rate of five per cent. per annum, on three thousand seven hundred and fifty dollars, from and after the 25th of January, 1820, until the same be paid; and, also, interest on twelve hundred and fifty dollars at the same rate, from the 25th of January, 1821, until payment shall be made; the appellees to pay the costs of this appeal, and the appellant costs in the court below.

Conrad and *Hennen*, for the plaintiffs.

Mazureau and *Preston*, for the defendant.

M'Donough, *v.* De Armas *et al.* VI, N. S. 44.

FIRST District.

When a new trial is refused below, the case will be remanded for it, if the Supreme Court cannot concur in the decision of the jury.

Dicks *et al. v.* Cash *et al.* VI, N. S. 45.

If the plaintiff has parted with his interest in the bill and gives no other evidence of title but that resulting from possession, he will be nonsuited.

THIRD District.

PORTER, J., delivered the opinion of the court.

This suit was instituted on a bill of exchange, and the plaintiffs were nonsuited, because it appeared, they had once parted with the legal interest in the instrument sued on, and gave no further evidence of title in themselves, but the possession of it. We think the judge below decided correctly. It is the well established doctrine in the court, and one equally supported by reason and authority.

If, indeed, it appeared, the endorsee had been merely the agent of the petitioners, the decision should have been otherwise, as we have already intimated in the case of Thompson *v.* Flower; but we cannot presume that fact, and it is not proved. It was upon proof of this fact that the case in 18 Johnson, to which we have been referred, was decided. 1 *Mart. N. S.* 301, 372; 2 *N. S.* 213; Johns. 239.

It is, therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Pierce, for the appellants.

Vawter *v.* Morgan. VI, N. S. 46.

FIRST District.

The provisions of the Code of Practice which require the judge to fix the amount of the bonds to be taken on a writ of sequestration, and the sheriff to return it into court are directory only. They do not authorise a recourse on the sheriff for a neglect, from which the plaintiffs receive no injury.

Dennistoun *et al. v.* Debuys *et al.* VI, N. S. 48.

If it be admitted that two persons have taken a third in business, and it appears they made him an advance of several thousand dollars, the interest of which is to be regulated by the profit: then they supply him with goods, pay for others shipped to him, supply him with money, and pay his drafts, a partnership will be inferred.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiffs claim the balance of an account, annexed to the petition.

Dupuy, one of the defendants, interrogated separately, answered, that a partnership existed between himself and the two defendants at the time the goods were purchased—that they were so, for the account of the three defendants.

Debuys & Longer, before answering, prayed that the interrogatories put singly to their co-defendant Dupuy, might be struck out, being illegal and improper.

They finally pleaded the general issue, and expressly denied the existence of a partnership between them and Dupuy, and repeated their prayer, that the interrogatories put singly to the latter, and his answers, be stricken out.

The plaintiff was nonsuited, and appealed.

He infers the court erred in concluding he had not found sufficient testimony to establish a partnership between Debuys & Longer, and the defendant Dupuy.

It is in evidence that the defendant, Longer, admitted that Debuys & Longer had taken Dupuy in business, and an account current between them and Dupuy shows that they made him an advance of 8000 dollars, to aid him in his business, the interest of which was to be determined by the profits—*au prorata des benefices.*

The same account current shows the defendants, Debuys & Longer, supplied Dupuy with goods, or paid for goods shipped to him, and supplied him with money and their notes, and paid his drafts.

We think this is evidence, that the defendants, Debuys & Longer, furnished a capital to Dupuy, to be employed in a trade, in the profits of which they were to share, since, for the use of the capital so employed, they were to receive an interest proportioned to the profits, *au prorata des benefices;* it is then necessarily to be concluded, that they were to share in the profits that might result from the purchases made on the credit which the possession of the capital they advanced

him gave; because the profits made on such purchases swelled the profits made by Dupuy in his business, and thus increased the share of Debuys & Longer, by increasing the rate of interest they had contracted for; a rate of interest which might exceed the rate of conventional interest, because, peradventure, they might not only lose any claim to interest; and, as to Dupuy, they could not be compelled to bear any portion of the loss, on which we give no opinion as to creditors, they might be charged, as partners, beyond the capital advanced.

It is, however, shown that the goods were on the plaintiffs' books charged to Dupuy alone, delivered to him, or sent by drays to his address, without any mention of the names of the other defendants; we think this does not alter the case. One partner binds the others when he purchases, in his own name, goods in which the partnership deals.

The amount of goods delivered, and their value, is proved.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiffs recover from the defendants two thousand six hundred and sixty-three dollars and forty-three cents, with costs in both courts.

Eustis, for the plaintiffs.

Grymes and *Lockett*, for the defendants.

Goicoechea *v.* Louisiana State Insurance Company.
VI, N. S. 51.

If there be a breach of warranty, no matter whether that breach were or not the cause of the condemnation, the assurers are discharged.

Warranties in policies are of two kinds, affirmative and promissory and both are in the nature of conditions precedent.

Written parts of a policy control those that are printed, where the written and printed words contradict each other.

But where they do not, the whole instrument must be construed together.

Where the policy has a declaration in writing that certain property insured belongs to a country at war with that which the ship is bound to, and it also contains a warranty against any loss arising from illicit trade, the insurers are not responsible for a loss proceeding from the latter cause.

FIRST District.

[Goicoechea v. Louisiana State Insurance Company.]

PORTER, J., delivered the opinion of the court.

This suit was instituted on a policy of insurance on goods on board the schooner Isaac M'Kim, from Havana, in the Island of Cuba, to Soto la Marina, in the republic of Mexico. The policy contains a warranty that the insurers are to be "free from any charge, damage or loss which may arise in consequence of engaging, or having been engaged, in illicit or prohibited trade, at any time whatsoever." The property insured is represented to be Spanish, and the premium paid is five per cent.

The schooner, on approaching the port of Soto la Marina, was taken possession of by an armed vessel belonging to the Mexican government. Proceedings were instituted against her in a court of justice, and she and her cargo were condemned.

The grounds of condemnation, as stated in the opinion of the assessor and the final decree of the court, are, that the cargo belonged to the Spaniards; that it was the produce of Spain; and that the schooner sailed from an enemy's port.

Some of the causes of condemnation being *jure belli*, and others a breach of municipal law, the question has been raised, and very fully argued, whether the defendants are protected by the warranty in the policy against illicit trade.

In the case of Cucullu against the present defendants, which lately underwent so much discussion in this court, the judgment rendered went on the idea, that if there was a breach of warranty, no matter whether that breach was or was not the cause of condemnation and loss, the assurers were discharged.

By our law, warranties in policies of insurance are of two kinds, affirmative, or promissory, and they are considered in the nature of a condition precedent. That is, on the falsehood of the affirmative, or the nonperformance of the executory stipulation, the contract becomes void, and is incapable of producing any obligation between the parties. The *lex mercatoria* of the continent of Europe has adopted the same principles, with this difference, perhaps, that there, a substantial compliance with the warranty is sufficient, while here it must be strictly, or, according to some, literally performed. Hence it follows, that as soon as a breach of the warranty is established, it is immaterial to inquire, whether the loss was occasioned by it or not; for the insured having failed to comply with the condition on which the insurer agreed to bind himself, the latter is discharged from all responsibility. Condy's Marshall, 348, 349, 436, 452. Park on Insurance, 422; Philips on Insurance, 127; *Emerigon No.* 1, *cap.* 6, *sect.* 4, 164 *a* 168; *Pothier on Ass., No.* 199; *Bonlay Paty Cours de Droit Commercial, vol.* 3, *sect.* 15, 507 *a* 510; *Code de Com. Franc. art.* 348.

It is unnecessary for us, therefore, to go into an examination of the point so much discussed at the bar, whether the breach of municipal law, or the violation of the rights of Mexico as a belligerent, was the principal cause of condemnation. Whether the sentence

shows the one or the other is immaterial, provided it shows there was a breach of the warranty.

That it does, there cannot be a doubt. The decree condemns the goods, because they are enemy's property, and because they are about to be introduced in violation of municipal law. The last cause of condemnation proves that the insured did not comply with his warranty, and as that is a condition precedent to his right of recovery, he cannot succeed in this action. See 3 Burrowes, 1419.

But the plaintiff contends that however correct such a doctrine may be in an ordinary case, the rule cannot apply here, because the terms of the contract do not authorise it.

The policy is in the usual form. Immediately after the clause of warranty against illicit trade, which makes a part of the printed instrument, there is written, "this insurance is declared to be on 74 boxes of white wax, marked S. C. valued at 7000 dollars, represented to be Spanish property."

These expressions being written, it is argued they must control that part of the policy which is printed; and, therefore, the assurers are responsible, as, by the contract, they were informed the assured was about to embark on an illicit trade, and with that knowledge took the risk. The high premium paid is offered as another argument in support of this construction.

The rule invoked by this argument, that the written parts of the policy should control those that are printed, is correct, because the written words are the immediate language and terms stated by the parties themselves, for the expression of their meaning; and the printed ones, a general *formula*, made for all cases that may be presented. But the rule cannot properly receive an application in cases other than those where the written and printed words so contradict each other that the one must yield to the other. Where they do not, the principle must necessarily be subordinate to another, to which the policy of insurance and all other contracts are subject in their interpretation, viz: that every part of them should have effect, if possible. This is a fundamental rule of construction, to which we do not, at this moment, recollect an exception, and it is founded on the plainest of reasons, namely; that it cannot be supposed that terms to which a meaning can be given, and which have an important bearing on the interest of the parties, were inserted or left in the contract, for no purpose. Civil Code, 270, art. 57; *Pothier on Ob., no.* 92; 1 Burrowes, 282.

The position, therefore, assumed by the plaintiff, will not bear the application of this principle. It is true, the insurers underwrote a policy which, among other risks, presented that of an illicit trade, but, at the same time, they declared that they would not assume the latter risk, and that he would take it on himself. Now, if we should say, that the representation of the property being Spanish, and that it was to be carried from an enemy's port to Soto la Marina, makes the insurers responsible for a breach of municipal law, then the

clause that the assured would take the risk of illicit trade means nothing. If, on the contrary, we give to this warranty its full effect, and say that the assurers were not to take that risk, we do not destroy that part of the policy which declares that the property was Spanish, and was to be carried from an enemy's port; because we still leave, as a subject for the contract to operate on, all other risks of the sea, and those proceeding from the war existing between Mexico and Spain. The latter interpretation is, therefore, that which the court is compelled to adopt, for by it we give effect to both clauses of the contract; by the other we would destroy one of them.

We have been referred by the counsel for the plaintiff, to a case decided in the circuit court of the United States, for Pennsylvania, and a *nisi prius* decision in New York, where it was held, that when the insurer knows the cargo which he underwrites to be prohibited, he is not protected by the warranty that he is not to be responsible for illicit trade. No reason is given in either of these cases, why, on a voyage of this kind, the underwriter may not agree to take sea or war risks, and refuse those arising from seizure for illicit trade, and we are totally at a loss to conceive on what grounds such an opinion can rest. Admitting that he is bound to know the municipal regulations of the country to which the goods are carried, he may certainly refuse to be answerable for a violation of them. Nothing prevents the parties to a contract of insurance from dividing the risks; the assurer may take all, or any portion as he thinks fit. These decisions, however, are in direct opposition to that given in the case of Hubbard *v.* Church, in the Supreme Court of the United States, and to that of Higgins *v.* Pomeroy, in the Supreme Court of Massachusetts. 2 Cranch, 232; 11 Mass. Rep. 104; 1 Condy's Marshall, 346; 1 Anthon, 26.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Grymes, for the plaintiff.

Eustis, for the defendants.

Oakley *et al. v.* Russell *et al.* VI, N. S. 58.

The owner will recover for injury to his goods on board the vessel, although they were removed from the quay, if there is full proof of their having been injured on board. Port Wardens are judges of the necessity of selling damaged goods at auction.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to obtain indemnity for damages, which the plaintiffs allege they have sustained in consequence of injury done to their merchandise, on board the vessel of the defendants, which occurred by the negligence or mismanagement of the master. The plaintiffs obtained judgment for 831 dollars 88 cents; from which the defendants appealed.

The facts of the case show, that the goods or merchandise, concerning which the present dispute arises, were shipped on board the brig to be carried from New York to New Orleans, acknowledged to have been received in good order; that they were landed at the port of destination and taken to the store house of the plaintiffs by their clerk or agent; that on opening the boxes which contained them, they were discovered to be damaged; that a survey was had on them by the Port Wardens, who condemned them as being unmerchantable, and they were consequently sold at auction, in such manner as to cause a loss in comparison with sound goods of the same kind, to the amount adjudged to the appellees, according to an estimate made in relation to their value in New Orleans, &c.

Against the correctness of the judgment of the district court, the defendant's counsel contends on the folowing grounds:

1. That, as the goods were received by the agent of the plaintiffs and taken to the store, without any objection having been made to their condition, the owners of the vessel are exonerated from all liability in damages.

2. That the proceedings of the Port Wardens having taken place, *ex parte*, cannot in any manner, affect the interests of the defendants.

3. That the estimation of injury or damages was made on a value improperly assessed, viz: that of such goods, if sound at the port of destination, whereas, it should have been their value at the port *a quo*, or invoice prices, &c.

In support of the first ground of defence, we are referred to the cases of Monro *v.* Owners of the Ship Baltic, and Urquhart *v.* Robinson, reported in 1 *Martin*, 195 and 236. The principal points deci-

ded in these cases, relates to the admissibility of an invoice in evidence to prove a deficiency in the goods which were actually delivered as compared with those stated in the invoice. The carriers were charged with direct embezzlement, at least gross negligence, in suffering some part of the goods to be stolen. In such cases clear and explicit testimony should be required to establish the fraud, or negligence so gross as to savor much of fraud.

In the case now under consideration, it was incumbent on the plaintiffs to show that the damage of which they complain, happened to the merchandise whilst in the possession of the carriers, &c. This fact, we are of opinion, the evidence in the cause completely establishes, notwithstanding the removal of the goods from the quay, or levee, before they were inspected.

There does not appear to have been any thing irregular, in the proceedings of the port wardens. They seem to be constituted by law the sole judges of the necessity which requires damaged goods to be sold by public auction. See 2 *Martin's Digest*, 404.

Notwithstanding the *obiter dicta* found in the opinion pronounced in the case of Ames *et al. v.* Reed, reported in 2 *N. S.* 236, we believe that the injury or damage for which indemnity is claimed in the present case, was properly estimated, in reference to the value of sound goods, similar to those injured, in New Orleans, the port of arrival.

In the case cited, the judgment was correct, although there is probably error in part of what was said by the way, in coming to the conclusion on which it is based.

Whatever may be the rule with regard to insurers, carriers are bound to indemnify for losses on goods occasioned by their negligence according to prices or value at the place where they may have contracted to deliver them. See the authorities referred to by the plaintiffs' counsel; *Pothier Ob. no.* 59, *et sequentes;* 8 Johns. Rep. 215; 15 *Ibid.* 28; *Curia Phil. tit. Danos, no.* 39, *vol.* 3, 247.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Smith, for the plaintiffs.

Morse, for the defendants.

Zino *v.* The Louisiana Insurance Company.
VI, N. S. 62.

A sentence rendered in a court of admiralty which is appealed from, does not prove a falsification of the warranties contained in the policy.

During the pendency of the cause in the admiralty court, the suit between the insurer and insured may be continued for a reasonable time. The appeal meanwhile prevents that judgment from having the force of *res judicata*.

FIRST District.

PORTER, J., delivered the opinion of the court.

This action is brought on two policies of insurance, one on the schooner Constitution, and the other on her cargo, from the port of New Orleans to Vera Cruz. Both vessel and goods are warranted to be American, and that the former shall not force the blockade.

The schooner on approaching, or rather, after having entered the waters of the harbor of Vera Cruz, was taken possession of by an armed vessel of the Mexican Government, libelled and condemned. The vessel, because she wanted the documents necessary to establish her neutral character; the goods, because they were about to be introduced in violation of the blockade.

To a petition stating the loss thus incurred, the defendants pleaded the general issue, and added a special plea, that the plaintiffs had not complied with the warranties contained in the policy.

To support the defence, copies of the proceedings had in the lower court were offered in evidence. They show that the schooner and cargo were condemned for the causes already mentioned; but they also show, that an appeal has been taken from that decision, and so far as we know, or can presume, is still pending before the Supreme Court of Mexico.

In this court the defendants have made three points.

1. That the plaintiff did not abandon, or that if he did, it was not in due time.

2. That he has not offered any proof of interest on the objects insured.

3. And lastly, that the warranties have not been complied with.

The opinion we have formed on the third point renders it unnecessary to give any positive decision on the first and second. Whether there was an abandonment or not, or in other words, whether the plaintiffs can recover for a total or partial loss, need not be examined until the merits can be gone into.

And whether there was sufficient proof of interest, is a question which stands in the same situation with that, in relation to the abandonment. There is proof before us of interest in the cargo, but none in the vessel. This would probably require us to distinguish, if we were about to give final judgment.

But this we cannot now do. The decree of the court of admiralty which is offered in evidence, as conclusive proof, that there has been a breach of the warranties contained in the policy has been appealed from, and the case is yet undetermined. We have looked much into the books that treat of this subject, and cannot find a single adjudged case, nor the opinion of any writer in relation to a sentence of condemnation, offered under such circumstances as that which is presented to the court, though we presume it must have frequently occurred, that on abandonment after capture, time has elapsed before judgment; that after judgment an appeal has been taken, and that while the cause is thus pending in the court where the property is libelled, the assurers have attempted to postpone the decision of their suit with the assured, until they could learn whether there was a condemnation or not.

Upon general principles, however, there can be no doubt, than an appeal from the judgment of the court of the first instance, upon the sentence, prevents it having the force of *res judicata*, consequently, it does not prove a falsification of the warranties in the policy.

The greatest difficulty we have had in the case, is, what course we should take with the cause in the situation it now stands before us. The evidence does not enable us to pronounce safely on the merits. In remanding it, due attention should be paid to the right of the plaintiffs not to be delayed an unreasonable time for the decision of the case in the court of appeals. And on the other hand, the cause should not be hurried so as to deprive the defendant of the defence which the first judgment may afford them. This matter may, however, be well entrusted to the court below, and it is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the case be remanded for a new trial, and that the appellees pay the costs of this appeal.

Denis, for the plaintiff.

Grymes, for the defendant.

Kenner's Syndics *v.* Sims. VI, N. S. 66.

FIRST District.

Parol evidence cannot be received of a promise to pay conventional interest.

The syndics are not to admit the compensation of a debt of the insolvent transferred since the failure. See Boissier's Syndics *v.* Belair, 1 *N. S.* 481; 2 *N. S.* 29.

Barrera *v.* Alpuente. VI, N. S. 69.

One born in Louisiana, in 1802, when the law made twenty-five the age of majority, and remaining in Louisiana until 1808, when the Civil Code established twenty-one as the period of majority, but subsequently removing to and residing in Spain, where twenty-five is the age, will be regarded as a major, if he or she come back to Louisiana "when above twenty-one, but under twenty-five."

COURT of Probates of New Orleans.

PORTER, J., delivered the opinion of the court.

The plaintiff sued in the court below to recover her share in the succession of her grandmother; she was nonsuited on the ground of being a minor, and from that judgment she has appealed to this court.

According to the facts as they appear on record, the plaintiff was born in the year 1802, in Louisiana, the laws of which, at that time, fixed the age of majority at twenty-five. She is now, and has been for several years, a Spanish subject, and a resident of Spain, where minority ceases at the same time of life. In the year 1808, when the plaintiff was six years old, a change was made in the law of the late territory of Orleans, and the period of majority was fixed at twenty-one.

The question, therefore, is, whether, under these circumstances, the plaintiff was a major at twenty-five years old, or at twenty-one. If

the former, she was not of age, when the suit was commenced and decided in the probate court.

The general rule is, that the laws of the domicil of origin govern the state and condition of the minor, into whatever country he removes. The laws of Louisiana, therefore, must determine at what period the plaintiff came of age; and by them, she was a major at twenty-five.* Admitting that her removal into another country before the alteration in our law would exempt her from its operations, and that her state and condition were fixed by the rules prevailing in the place in which she was born, at the time she left it, a point by no means free from difficulty, no proof has been given that the plaintiff was taken out of Louisiana before the change made in 1808; and as the defendant by pleading the minority, assumed the affirmative, it was her duty to establish the fact on which the exception could be sustained.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed; that the exception filed by the defendant be overruled, and that the cause be remanded, to be proceeded in according to law; the appellees paying the costs of this appeal.

Strawbridge, for the plaintiff.

Cuvillier, for the defendant.

Latorre *v.* Fortier. VI, N. S. 71.

PARISH Court of New Orleans.

A case of account. Verdict of jury affirmed.

* This sentence is thus printed, "and by them she was a major at twenty-five," in Story's Conflict of Laws, 72; and this must have increased the learned commentator's perplexity. It is manifest that the court intended "twenty-one," else how could it arrive at its conclusion, that she was now, at the time of suit brought, a major, though under twenty-five.

Fox *v.* Avart. VI, N. S. 72.

FIRST District.

Although it be stipulated that a building is to be delivered after an approval of it by experts, yet if the owner receive it from the contractor, and occupies it, he cannot resist payment, on the ground that experts did not approve the work. This stipulation being made for his benefit, he might, and did waive it.

Bell *v.* James. VI, N. S. 74.

If the submission be to an award under the hands and seals of the arbitrators, the seals are essential, and if the contract arise in another country, it is for this court *jus dicere* not *jus dare*, how much soever it might condemn such technicality.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action on an award made in the state of Kentucky, in consequence of a submission entered into by the plaintiff and defendant, to refer the decision of their differences to certain persons therein named.

By the terms of the submission, the award of the arbitrators was to be under their hand and seal, or if they could not agree, under the hand and seal of one of them, and the hand of the umpire they might choose.

The arbitrators did agree, but did not make their award under seal. The district judge was of opinion, that as the award was not under the seals of the arbitrators, it could have no binding effect; that it was a condition of the submission, and could not be dispensed with.

We gave an entire assent to the conclusion to which the court below came, and to the reasoning on which that conclusion was founded. A great deal has been addressed to the court, on the

unimportance of the formality. It has been urged that it could have given no more value or force to the decision of the arbitrators; that it was not intended to have any by the parties, the word seal being thrown into the submission by accident or inadvertence; that the defect, if it be one, is caused by the parol evidence introduced, showing the award to have been really made as stated in the petition; and finally, that such technicalities are the disgrace of the law, and that the court ought to disregard them.

If these technicalities be the disgrace of the common law and the laws of Kentucky, the arguments used might perhaps be advantageously addressed to the legislature of that state to induce it to change them; but they are entirely out of place in a court of justice, whose duty is *jus dicere*, not *jus dare*. And more particularly, to a court called on to pronounce on a contract made in another country, which must be construed in relation to the laws of that country. If the agreement was not binding where it was made, it can not become so by being brought into this state, and we should feel we were doing a very wrong thing, to render any other judgment than that which we believe would be given by the tribunals of the state where the parties contracted. Now the defendant shows us a case decided in the supreme court of Kentucky, where, under a similar submission to that made here, it was held, that if the award was not under seal, it was bad. And he has referred us to several other authorities from the common law, that such a variance between the submission and decree of the arbitrators, renders the latter void and of no effect. We have no doubt, therefore, that, if the action had been brought on this award, in the state where it was made, it could not have been maintained; and with this conviction, we can not give effect to it here. The arguments of the plaintiff, that all this is unmeaning formality, that it is the offspring of a dark age, and unworthy of the light of this, furnishes no reason why this court can decide differently. We can take no such liberty with the laws and jurisprudence of our sister states. They are the best judges of what suits themselves; and if their citizens come here to litigate their claims on contracts made at home, arguments about the defects of their own laws, and their absurd technicalities can not be listened to by us.—Harden's Rep. 201; 1 Bac. Ab. 217.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Preston, for the plaintiff.

Whittelsey and *Hawes*, for the defendant.

EASTERN DISTRICT, JUNE TERM, 1827.

Barfield *v.* Hewlett. VI, N. S. 78.

If the two experts disagree on the genuineness of a signature submitted to them, a third cannot be appointed: unanimity is required.
An instrument is not void because it wants a date.
Experts cannot proceed with *one* piece of comparison only.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff claims as his property, certain slaves in the possession of the defendant. The latter pleaded the general issue, and averred himself to be a *bona fide* purchaser. There was judgment against him, and he appealed.

1. At the trial, two experts were appointed to pronounce on the verity of the signature of the defendant's vendor, to an agreement acknowledging the plaintiff's title to the slaves. The experts being unable to agree, the court on the plaintiff's motion appointed a third, notwithstanding the opposition of the defendant, who took a bill of exceptions.

2. The original of the copy of the bill of sale, annexed to the defendant's answer, under which he claimed, being offered as a sole piece of comparison, to be acted by the experts, the defendant objected to its admission as such, on the ground that it was neither proved nor admitted, that Barfield the vendor, and the person who

subscribed the agreement were the same individual. The objection being overruled, the defendant took a second bill of exceptions.

3. On the report of the experts, the defendant objected to the reading of the agreement, on the ground that as to him, a third person, it had no date: the objection was overruled by a third bill of exception taken.

I. This court is of opinion that the district court erred, in appointing a third expert: contested signatures are directed to be submitted to two persons, having skill to judge of handwriting, who shall report on oath. Civil Code, 306, art. 26. Unanimity in the two experts is required, to establish the signature; and no power is given to the courts, on the disagreement of the experts to appoint a third; the opinion of the third expert, being balanced by that with whom he does not concur, or those of the two original experts balancing each other, it will follow that the signature will be proven or disproven by one expert only. Whether in such a case the two experts are to be discharged, and two others appointed, will be examined, when the opinion of another court on this point, being complained of, will make it proper for us to do so.

II. The Code, *loco citato*, requires the contested signature to be tested by a comparison with papers acknowledged to have been signed by the party. This mode of evidence is in most cases very unsafe, even where there are several pieces of comparison; the Code requires more than one; and nothing authorises to proceed on a single one.

III. The want of a date does not render an instrument void, and therefore ought not to prevent its being read: the objection to the reading of the agreement by the court has less force than that to its being read to the jury. After it is read the tribunal trying the cause may ascertain the period of the confection of an undated agreement by circumstances. We think the court did not err in allowing the agreement to be read.

The opinion we have formed on the bills of exceptions taken by the defendant requiring us to remand the case, it becomes our duty to examine a bill of exceptions of the appellee who complains of the decision of the first judge.

The defendant objected to the reading of certain depositions taken by the plaintiff before George W. Oliver, a commissioner of the district court, on the ground that it did not sufficiently appear, as was alleged, that the witness had been sworn.

The commisioner's certificate states that he took the depositions of Batten, Cox, Campbell, Barfield and Elam, and that said witnesses being duly sworn, upon the evangelists of Almighty God, deposeth and sayeth. Every witness subscribes his own deposition at the foot of which the commissioner attests he swore thereto; and this circumstance is repeated in the conclusion.

It is not complained that the signature of the commissioner is not genuine, and we are unable to discover on what the objection stands.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded with directions to the judge to proceed thereon according to law, particularly not to appoint a third expert, and to require the production of more than one piece of comparison; and it is ordered that the appellee pay costs in this court.

Pierce, for the plaintiff.

Grymes, for the defendant.

Wood *v.* Steamboat Fort Adams and Owners.
VI, N. S. 83.

A partner has no action against his copartner for any sum paid by the former for the partnership, until a final settlement takes place.

Even when the claim has been settled and acknowledged. Case of Drumgoole v. Gardner's Widow and Heirs, 10 *Martin*, 433, re-affirmed.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff and appellant urges, the district judge erred in dismissing his petition, on the ground that his suit was not maintainable, being against his copartners and joint owners, for a specific claim against the joint concern, under the authority of the case of Drumgoole *v.* Gardner's Widow and Heirs, 10 *Martin*, 433. He denies the conclusion to which the court came in that case, and the resemblance of the present to it.

The plaintiff states that the steamboat and its owners owe him the sum of 3000 dollars and upwards, with conventional interest, for wages, supplies, and disbursements, for which sum he claims a lien on the boat; and he avers he is owner of one-tenth of the boat. He concludes for citations and the provisional seizure of the boat.

This is, therefore, clearly an action, in which a part owner, or partner, seeks the recovery of money alleged to be due him by his co-partners or joint owners, for advances to the partnership or joint concern. The principles recognised in the case cited are, therefore, to regulate this case: for the plaintiff does not seek a general and final settlement of the debts, active and passive of the co-partners or joint

tenants, but the absolute payment of a specific demand of his. We see, therefore, a perfect resemblance in the two cases, as to the facts to which the principles apply.

The principle is however oppugned as borrowed from the common law, and on account of its technicality.

Justice in all countries, emphatically requires that those who demand their own should give to others theirs—that a multiplicity of actions should be avoided; that, as in the course of a partnership, its members are respectively, at different periods, creditors or debtors, no special transaction of it should be settled abstractedly from the others; but that whenever one partner desires to receive what is his, the accounts should be settled at the same time, and the respective balance ascertained.

These principles apply to special as well as to commercial partnerships.

But the plaintiff and appellant argue, that to them there is an exception, and he is within it.

The exception is, when the claim of a partner has been settled and acknowledged, an action may be maintained thereon.

To bring himself within this exception, he shows that one of the partners or joint owners acknowledged a balance due to the plaintiff, bearing interest at ten per cent., and the same person, and another owner, gave him a promissory note, in their own names, and that of the other owners.

But it is not shown, that either of the joint owners, who acknowledged a balance to the plaintiff or subscribed the note, had any authority to bind the others.

The case is not to be distinguished from that cited in *Martin*, Faurie *et al. v.* Millaudon *et al.*

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Whittlesey, for the plaintiff.

Pierce, for the defendants.

M'Micken *v.* Brown. VI, N. S. 85.

A party who, without opposition, suffers evidence to go to the jury, on a fact not put in issue, is bound by their decision on it.

THIRD District.

MARTIN, J., delivered the opinion of the court.

The defendant, sued for the value of goods stolen from the plaintiff, to the stealth of which the former is charged to have been an accessary, pleaded the general issue, and on a verdict and judgment against him, appealed.

At the trial his counsel requested the judge to charge the jury, that "he could not be found guilty on the pleadings, unless it was proved he assisted in stealing the goods, and it was not sufficient to show he received the goods, knowing them to have been stolen." The judge refused to charge the jury. A bill of exceptions was taken.

The defendant, if he chose to avail himself of this defence, ought to have opposed the introduction of evidence of the receipt of the stolen goods. He contested his liability as a receiver before the jury, and must be bound by their decision, even on a fact not specially put in issue, and the judge acted correctly in withholding the charge, and refusing to enable the defendant to counteract the effect of evidence he had suffered to go to the jury. Bryan and Wife *v.* Moore; Canfield *v.* M'Laughlin.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Preston, for the plaintiff.

Bradford, for the defendant.

Miller *v.* Morgan. VI, N. S. 86.

The sheriff is bound to seize the property pointed out by the defendant, in the execution, and may not insist on selling the personal property of defendant first.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action against the sheriff of the parish of New Orleans, for seizing certain property of the plaintiff's under a writ of *fieri facias*, in opposition to his wishes and request. The petition states that other property was pointed out to the defendant, and that he was requested to levy on it.

The answer consists of a general denial, and an allegation that the defendant made the seizure under a writ of execution issued in favor of one Miller against the plaintiff.

The cause was tried in the inferior court by a jury who found a verdict in favor of the plaintiff with one cent damages. The defendant appealed and in this court has made the following points.

1. That the defendant obeyed the order of the court on the execution issued, which required him in *totidem verbis*, to seize and sell first the personal property of the defendant.

2. There is no other evidence that any other property situated within the parish, unincumbered and belonging to the defendant, was offered to the sheriff to satisfy the execution.

The third is a deduction of law from these grounds, and does not require to be particularly noticed.

I. The 646th article of the Code of Practice directs the sheriff in executing a writ to first seize movables, "unless the debtor point out himself to the sheriff what property he wishes to have seized and sold first: provided the property thus pointed out be situated in the parish."

The defence drawn from the phraseology of the writ cannot avail the defendant. The order in which the defendant is directed by it to seize property, is that commanded by the law, and any other would be erroneous. But the same law which directs the property to be levied on in this manner, contains an exception when the defendant points out any particular object on which he wishes the levy to be made. And whenever a case coming within this exception is presented to the sheriff, it is his duty to act under the rule provided for such an occurrence, and not under the general regulation which

does not contemplate any interference on the part of the defendant in execution.

II. The second ground of defence appears also to us untenable. The statement of facts admits that property was pointed out to the defendant, of sufficient value to satisfy the amount of the *fieri facias;* if that property was so situated as to place the defendant within the *proviso* of the statute, it was his duty to prove it. 3 Johns. Rep. 438; 4 *Ibid.* 304.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Carleton and *Lockett*, for the plaintiff.

Flower *et al. v.* Griffith. VI, N. S. 89.

The legislature cannot delegate the power of making laws for the state.

The omission to print, in the new Code, articles contained in the old, does not repeal them.

The twenty-first title of the third book of the old Code, is yet in force.

The Code of 1808 received legislative sanction from the territorial assembly; the amendments to that Code were adopted by the legislature of the state, and if the book, printed in 1825 as the Code of Louisiana, contains the old Code and amendments faithfully transcribed, then all the provisions in it are binding, and have the force of law; but if it contains any thing more, what has been added has not. If any thing has been omitted, that omission does not prevent the law which had been already promulgated in the old Code, from being still in force.

THIRD District.

PORTER, J., delivered the opinion of the court.

This action was commenced by attachment, which was levied on a tract of land, which the defendant held in common with his sister. The proceedings previous to final judgment need not be set out, as the only error assigned by the plaintiffs is, that the court below had decreed that no execution should issue against the property attached, until a partition and settlement could take place between the defendant and his sister, co-heirs of the succession of L. C. Griffith.

The facts of the case show, that the property is held in common between the defendant and his sister. The only question, therefore, is whether the judgment be correct in point of law.

[Flowers et al. v. Griffith.]

The old Code contained a provision that "the undivided share belonging to a co-heir in a succession cannot be seized on an execution, but the creditors have a right to demand a partition of the estate between the co-heirs." 490, art. 6.

It is contended that this article is repealed by the new Code in which no such regulation is found. If it appeared that the legislature had made it a part of their amendments to that work, that this article should be suppressed, then perhaps this argument would be correct.

But nothing of that kind has been shown, and our own researches have led us to the directly opposite conclusion. The jurists who were appointed to alter and improve our old Code, in their report to the legislature, proposed amendments of three kinds. The first, the insertion of new provisions; the second, the modification of those already existing, and the third, the suppression of those articles which were incompatible with the changes they thought proper to recommend.

We have carefully examined this report, and not a word is said in it of the last title of the old Code; it is neither proposed to be amended by new provisions, nor modified, and not suppressed.

The amendments to the other parts of the old Code, were submitted to the legislature, and with some slight alterations adopted. But the remaining provisions in it, did not pass a second time under the view of the legislature, nor were they re-enacted. They were left as they originally stood.

After these amendments were passed, the best way perhaps would have been to have printed them separately. The citizen could have then seen at once what change had been made in the old law.

But it was thought advisable from the utility, which would result from presenting the whole work together, to direct that the amendments, and the old Code, should be printed in one book.

The persons to whom this duty was intrusted were not, nor could they be, charged with legislative powers. Their duty was ministerial. They had no authority to alter in the smallest respect the law. They were empowered to print the Code, and the amendments which the legislature had adopted, and if they made any further change, it is not binding on the citizen. The work which they have presented, has never been passed on by the legislature, nor is it clothed with the signatures of the speaker of the house of representatives, the president of the senate, nor the governor. The amendments to the old Code have received legislative sanction, the old Code itself has, and if the book now printed as the Code of Louisiana contains that old Code, and the amendments, then all the provisions in it are binding and have the force of law. But if it contains any thing more, what has been added has not. And if any thing has been omitted, that omission does not prevent the law which had been already promulgated in the old Code from being in force. To decide

otherwise, would be virtually a declaration, that the persons who were appointed to print the Code, had legislative powers.*

Such powers they of course never intended to assume, and we have no doubt they discharged their duty faithfully, and in the main judiciously, but they were liable to err, and in our opinion have erred in the instance before us. The whole of the twenty-first title of the third book of the old Code has been omitted in the new, and yet it was not proposed to be suppressed by the jurists, nor does it appear to have been repealed by any act of the legislature of which we can get cognisance. We have examined the original of the amendments, to the Code, in the office of the secretary of state, the only place where they are to be found distinct and separate, and not a word is there said of repealing this title. We of course are bound to come to the conclusion, that it is still in force.†

As to the argument drawn from the Code of Practice, it presents no difficulty. The law by which the work was adopted declares, that when its provisions are contrary, or repugnant to those of the Civil Code, the latter shall be considered as repealed. That contained in the former, is the general rule which existed previous to its

* In reference to the duties of the jurists who revised the Civil Code, and prepared the Code of Practice, a very important proposition has been enunciated by the court, (Rost, J., delivering the opinion of the bench,) and which must be taken as the deliberate doctrine of the whole court, inasmuch as the proposition serves absolutely as the basis of the decree. The positive provision of the 49th article of the Code of Practice, that one having only "the civil or *legal* possession" of the premises, or the *right* to them, at the instant of the disturbance, cannot bring a possessory action for them, being made to yield to divers articles of the Louisiana Code, which countenance the possessory action brought by persons not in actual possession. The words of judge Rost are weighty and his conclusions thorough. "Here then is a right of action given for all possessions alike, when they have lasted one year and are not precarious, in direct opposition to the 49th article of the Code of Practice. One of these laws must yield, and we find no difficulty in saying which is to prevail. The court cannot be ignorant of the mode in which our Codes were prepared and became laws. They were written by lawyers, who mixed with the positive legislation which they contained, definitions seldom accurate, and points of doctrine always unnecessary. The legislature modified and changed many of the provisions relating to the positive legislation, but adopted the definitions and abstract doctrine without material alteration. From this circumstance, as well as from the inherent difficulty of the subject, the positive provisions of our Code are often at variance with the theoretical part, which was intended to elucidate them; and whenever that occurs, we deem it a sound rule of interpretation to disregard the doctrine and consider the definitions modified by the clear intent of the positive enactments. Ellis v. Prevost *et al.*, 13 *Lou. Rep.* 236.

† The reader is left to consider how far this train of doctrine is affected by the act of 1828, March 25, section 26, which provides, "that all the civil laws which were in force before the promulgation of the Civil Code lately promulgated, be and are hereby abrogated," except third chapter, tenth title of the old Code touching the dissolution of communities and corporations.

passage, and with that general rule stood the exception. We have more than once decided, that re-enacting the general rule, did not repeal the exception with which it was previously accompanied. Code of Practice, 643, 6, 7. Civil Code,* 490, art. 6.

The judgment of the court below, should be affirmed, with costs.

Watts and *Lobdell*, for the plaintiffs.

Bernardine v. L'Espinasse. VI, N. S. 94.

Whether an executor can do any act to defeat the duties imposed on him by the will—*Quære.*

Collateral heirs setting up a claim to a succession, must show that the relations in the ascending line have ceased to exist.

A party who is neither appellant, nor appellee, cannot have a judgment amended in his favor.

PARISH Court of New Orleans.

Porter, J., delivered the opinion of the court.

The plaintiff claims her freedom from the defendant, who asserts title to her in virtue of a purchase from the heirs of Galez, whom he has cited in warranty. They appeared, and pleaded that the plaintiff was their slave.

The facts of the case as they appear in evidence are as follows: The plaintiff was born in the year 1781, in St. Domingo, the slave of a family called Galea. She fell by partition, or otherwise, to one of the daughters, who intermarried with a certain Antoine Goyffon. —At the period the negroes revolted in that Island, Goyffon and his wife fled. The plaintiff, whose attachment to them appears to have been great, swam after them and got on board the vessel in which they were escaping. She accompanied them to the Island of Cuba, and served them as a slave until the year 1809.—When forced to leave that country, she again followed them and came to Louisiana. Shortly after their arrival here, her mistress died without making a will, but recommending to her husband, not to forget the attachment and long and faithful services of the plaintiff, and requested him to set her free. The husband survived the wife several years. Some

* Observe, *Civil Code* here means Louisiana Code.

time before his decease, he made his testament, in which he gave the plaintiff and her two children their freedom, and appointed the defendant his executor and residuary legatee.

The defendant accepted the trust. He applied to the court of probates to be confirmed in the appointment—he was confirmed in it; and he took an oath that he would well and faithfully perform the duties of the office.

However he may have discharged part of those duties, he neglected to perform that which was imposed on him in relation to the plaintiff. When requested to comply with it by persons taking an interest in her situation, he promised he would, but evaded an immediate compliance, on the ground that it was necessary the plaintiff should work for some time, before he could set her free, in order that she might reimburse him for moneys he had advanced to her. After retaining her several years in this situation, he finally refused to liberate her, and set up a title in himself, in virtue of a purchase he had made since he was appointed executor, from persons styling themselves heirs of the wife of Goyffon.

Whether an executor, or any other agent, can enter into contracts to defeat the discharge of the trust which he has undertaken for his principal, is a grave question, on which we do not now find it necessary to express an opinion. The defendant has called the heirs from whom he bought in warranty, and has thrown on them the burthen of proving a title to the plaintiff. They have alleged, and proved, that they are the collateral heirs of Jeanne Augustine Galez, wife of Goyffon, but this is not sufficient to prove their right to her. It is a well established rule of evidence, that where collateral relations set up a claim to the property of an inheritance, they must show that the relations in the ascending line have ceased to exist. Upon this principle, the collateral heir was defeated in the case of Hooter's Heirs *v.* Tippett, and we refer to the decision there, as containing the reasons on which this doctrine is founded. 12 *Martin*, 392.

No such proof has been administered here, and as the heirs cited in warranty have failed in showing a right in themselves, they of course have failed in showing they transmitted any to the defendant L'Espinasse, and he stands before the court without any legal defence to the plaintiff's demand.

If the case presented strong equitable claims on the part of the defendant, and the warrantors, we might, under the powers given to this court, to remand whenever justice requires it, send the cause back for proof of heirship.—But the view we have taken of the case, has brought us to the conclusion, that the justice and equity of it are most emphatically with the plaintiff: and with this conviction, we cannot aid the defendant in making out a harsh demand, which has no foundation but in the strict rules of law.

He has complained, that the judgment of the court below is erroneous in not giving him judgment against the heirs of Galez. Perhaps it is so, but we cannot go into that inquiry, as the cause now

stands before us; for it is on the appeal of those heirs that the case has been brought before this tribunal. And though he has been heard in defence of his title, as making a part of the appellant's case, the judgment cannot be amended in his favor, for he is neither appellant, nor appellee.

It is, therefore, ordered, adjudged and decreed, that the judgment the parish court be affirmed, with costs.

Seghers, for the plaintiff.

Nixon, for the defendant.

Lacroix *v.* Menard. VI, N. S. 98.

FIRST District.

Where nothing shows that defendant authorised or even ratified the use of his name in the contract, on which action is brought, although his brother *se fit fort, i. e.*, covenanted that he had authority, or would procure a ratification of the defendant for his acts, the defendant is not bound.

Boyle *v.* Dickenson *et al.* VI, N. S. 101.

If a carrier converts goods to his own use by failing to deliver them according to his contract, the measure of damages is the full value of the property, and not the diminished value of the goods by the change of voyage.

PARISH Court of New Orleans.

MATHEWS, J., delivered the opinion of the court.

This suit is brought against the master and owners of the brig

[Boyle v. Dickerson et al.]

Arethusa, to recover from them a quantity of horns, as stated in the petition, or their value, &c.

The cause was submitted to a jury in the court below, who found a verdict for the plaintiff for 350 dollars, the estimated value of the property for which suit was commenced; and being rendered for that amount the defendants appealed.

The facts of the case are these. The brig was advertised to go a voyage direct from the port of New Orleans to that of New York; and with an expectation that it would be thus transported, the property in question was put on board by the plaintiff consigned to his agent or consignees at the latter port. The destination of the vessel was afterwards changed, and she was laden for Providence; to which place she sailed. Previous to her departure the plaintiff required that his property should be returned to him free of expense or charges; which was not done on account of the difficulty and expense of unloading the brig: but the consignees in this port offered to pay to him a price or value for the horns, such as might be determined and fixed by disinterested appraisers; to this proposal he refused to accede. The vessel made the voyage to Providence, returned to New York, and then made a tender of the plaintiff's property to his consignees which they refused to receive, &c.

With regard to the questions of law which arise out of these facts, the right of the plaintiff to sue and recover as for damages on account of the violation of their contract by the carriers, is not denied by either party. The dispute is, as to the measure of damages, or extent of injury done to him, by those who undertook to carry his goods. It is contended on their part, that these ought to be ascertained by the effect which the change of voyage has actually had on the interests of the appellee by lessening the value of the property shipped. To this proposition we cannot assent. The change of destination in the voyage of the brig, annulled entirely the contract of affreightment, and the carriers were bound to return his goods to the shipper, and their neglect and refusal to do so, amounts to a conversion of them to their own use, and consequently they are answerable in damages at least, to the *full* value of the property. This has been ascertained by the verdict of the jury and ought not to be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be affirmed, with costs.

Cuvillier, for the plaintiff.

Duncan, for the defendant.

Lanusse v. Lanna. VI, N. S. 103.

The mortgaged creditor is not obliged to bring his action against the property last alienated when that property is not subject to the lien.

A wife who, previously to the act of 1818, renounced her right on property sold, did not, by doing so, release her mortgage on that which was previously alienated. The wife has no mortgage on her husband's estate for the fruits of her paraphernal estate, nor on the estate of the executor of her father.

In making the imputation of payment, it is not the debt first contracted, but that first due, which is considered to be the most ancient.

A mortgage cannot be enforced on the improvements made by a third possessor.

The proper mode of ascertaining their value, is to have them estimated after the sale.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action instituted against the third possessor of property, on which the plaintiff states she has a lien. She avers that she brought a large estate to her late husband; that he failed; that she has only received a small portion of the amount due to her; and that the defendant is in possession of a house and lot sold by her husband during the marriage. She prays that the defendant may be condemned to pay the balance due her, or that in default thereof, the premises purchased by him be seized, and sold, to satisfy her claim.

The defendant pleads that he is the lawful owner of the house and lot mentioned in the petition, having purchased it from one Nic. Bertoly, who purchased it from the Planters' Bank; by whom it had been acquired from Fleury Soubercase, who bought it from the husband of the petitioner.

And that the lien claimed by the petitioner cannot affect this property, because nothing was due her for her paraphernal or dotal rights; because she did not enregister her mortgage according to law; because her right if it does exist, accrued since the sale from her husband to the person under whom the defendant claims; and lastly, that if the lien is recognised by the court, it cannot be enforced on the improvements made on the lot by the defendant, and those from whom he derives his title.

The answer concludes by citing Soubercase's heir in warranty.

She appeared, and in her answers repeated the same defence as that set up by the defendant; and added to it another, that the plaintiff was bound to exercise her right according to the order of the sales, "beginning with the latest and ascending in succession, from

the last, to the oldest;" that the value of the property sold subsequently to the sale made to the ancestor of the respondent, would be more than sufficient to satisfy the petitioner, had she not renounced her right on the property so alienated, and that by said renunciation, she has lost her recourse on the house and lot which she now seeks to have sold.

The district court was of opinion that it was indispensably necessary for the plaintiff to first exercise her rights on the property last sold, and nonsuited her. From this judgment she has appealed.

The correctness of this judgment must therefore be examined before we can go into the merits. For if the plea on which it was rendered should be found sustainable, it will preclude any inquiry into the other matters at issue.

As a general rule, the judge was certainly correct in saying that where there are several sales of property subject to a tacit mortgage, the creditor must enforce his lien on the object last sold. But that rule has no application to a case where the property last alienated is not subject to the lien. It is not merely the subsequent sale of the debtor, that confers the right on the first purchaser; but a sale made in such a manner, that the creditor can enforce his right on the thing sold. This necessarily results from the language used in the statute, and from the reason on which the rule was established. The law states that if the debtor has made several sales, and the creditors find themselves in the necessity of pursuing their payment against the property so sold, they must commence with that last disposed of.—This provision evidently contemplates several sales of immovables, on which the creditor has a lien; for if he has none on the object last sold, there is nothing for him to bring his action against. The defence is, in truth, one of discussion; and it depends for its validity on the fact of there being other property to be discussed; when the plea shows that the thing sold is not subject to the creditors' lien, there is nothing for the exception to rest on.

In the present case, the answer of the vendor cited in warranty, stated, that the plaintiff had renounced her mortgage on the property sold subsequently to that, which forms the subject of the present contest. We think, therefore, the judge erred in directing her to bring her action against this property, before she could exercise her right on that in the defendant's possession.

It is, however, contended that by doing so she has lost her mortgage on the house and lot mentioned in the petition. But in this case the court can see no foundation on which such a position can be maintained. The act of 1817, it is true, directs, that where property is subject to a general or tacit mortgage, and it is sold to several persons, the mortgagee must bring his action against the last buyer, ascending in succession from the last to the oldest.—Now, admitting that the consequence contended for might follow, if the purchaser acquired after the act of 1817, on which it is not necessary to express an opinion. We are clear that it does not, where the sale was made pre-

vious to the passage of the law. At the time the defendant, or those under whom he claims bought, the property was primarily, not subsidiarily, subject to the mortgage of the wife, in case the husband sold subsequently to others; and the rights of the parties must be tested by the law at the time of the contract, not by the changes that were subsequently made in it.

The first ground of defence is, that nothing is due to the plaintiff by her husband's estate.—On this point a great deal of evidence was taken on the trial, and it has been the subject of much observation by the counsel in this court. The claim of the plaintiff may be divided into three distinct heads, and the inquiry into their validity can be best conducted by considering them separately.

The first is that which is derived from moneys received by her husband from various sales of property belonging to her father's succession, and the whole amount on this head seems to have been paid away in discharging the debts due by the succession, excepting the sum of 2667 dollars.

The second arises from the proceeds of crops made on the paraphernal property of the plaintiff. This claim has been contested by the defendant, solely on the ground, that the moneys were received by the husband since the passage of the Civil Code, and that according to its provisions, he was only responsible for such portions of the fruits as remained unconsumed at the dissolution of the marriage.—Civil Code, 334, art. 60.

Whether this argument be correct in relation to marriages contracted before the passage of the Code, we need not stop to inquire, being of opinion, that by the law, as it stood previously, no right existed on the part of the wife to claim a mortgage on her husband's estate for the fruits of her paraphernal property, which he had received and consumed.

It is true, *Febrero*, in the passage cited and relied on by the counsel for plaintiff, does state, "that the husband has dominion over the paraphernal effects of his wife, and that the fruits belong to him, if she deliver them to him with that intention, and not otherwise.—*Part.* 1, *cap.* 2, *sect.* 1, *no.* 11.

But it does not follow, that if she does not deliver them with that intention, that he is responsible for them, as making a part of her property. On the contrary, the same writer expressly states in subsequent parts of his work, that the fruits of the paraphernal estate, whether delivered by the wife to the husband or not, enter into the community of acquests and gains, and belong to both in equal portions. In this assertion, he is clearly supported by the 3d law of the 4th title of the 16th book of the *Novisima Recap. Febrero, p.* 2, *lib.* 1, *cap.* 3, *sect.* 1, *no.* 57; *Ibid. cap.* 5, *sect.* 5, *no.* 39.

Now in this case, there were no gains; if there were, the plaintiff has renounced the community in them: and if she had not, no claim arising from them would give a mortgage on her husband's estate.

She contends, however, that the proceeds of the crop came into

the hands of her husband, as testamentary executor of her father, and that he was acting in that capacity, and not in her right, when these fruits were made on the plantation. The facts, as they appear in evidence, do not support this position, for the book of accounts shows, that none of the crops after the year 1809, is carried to the credit of the estate of the late J. B. Macarty. That in that year, Lanusse and B. Macarty purchased out the other heir's right in the plantation, and after that time carried it on, on their joint account, and in their individual capacity.

But supposing the plaintiff not to have given his consent to the change which the executors seem to have made in the capacity in which they held the property; that the proceeds of the crops must be considered as having come into her husband's hands as testamentary executor; and that he never rendered any account of them in his lifetime: then the consequence is, that at his decease, he owed as testamentary executor; and for debts due in that character, it is not understood by the court that any mortgage existed on his estate.

The third and most important item in the account is that founded on the receipt by the husband of the price of the plantation, of which the plaintiff was one-third owner, sold in the year 1818. But no part of that price appears to have come into his hands previous to the alienation to Soubercase in the year 1816, under whom the defendant claims, except a house and lot received in payment at 25,000 dollars. For two-thirds of this sum, viz: 16,666 dollars and 66 cents. she had a mortgage on the property then owned by her husband, and our next inquiry is, does it still remain in force? The defendant insists it does not: 1. because it has not been duly recorded: and 2. because it has been paid.

The first objection we think unsupported. Her mortgage was a tacit one and could not be recorded. It does not appear that any act ever passed between the plaintiff and her husband in relation to her paraphernal effects, which it was necessary for her to record. The bill of sale by which she and her husband sold property to a third person, in which they had a joint interest and in which they acknowledged a receipt of part of the price, did not necessarily prove it, and the reading it would not have given notice to the world of the lien. The instrument indeed was recorded for the purpose of assuring the mortgage of the vendors on the property sold, and in that light alone would it have been understood by those who read it.—The objection that the wife ought to have made it more explicit, proves too much, for by the same reasoning she would in all cases lose her tacit mortgage unless she made an explicit act, and had it recorded. But this is contrary to the meaning of the statute, the reason of the thing, and the settled jurisprudence of this court. 3 *N. S.* 239; *Ibid.* 229; 4 *N. S.* 479.

The great question is, whether this debt, and the other for which the plaintiff had a lien, have been paid?

It appears that since the failure of the husband, she has received

29,060 dollars, and this sum would certainly extinguish her claim on that property if nothing more had been due to her.

But subsequent to the alienation of the house and lot of which the defendant is the possessor other sums of money came into the hands of the husband amounting to 52,500 dollars.

The defendant, however contends, that the payment must be imputed to the most ancient debt, which was that due for the house and lot, and for the moneys received out of the father's succession.

If, in making the imputation of payment, the debt first contracted was to be considered as the most ancient, this position would be correct, but it is not the period of contracting, but the time when the debt falls due, that is to be considered in ascertaining the antiquity of the demand. *Toullier, vol.* 3, *liv.* 3, *tit.* 8, *cap.* 5, *no.* 184.

Now in the case before us, all the debts fell due at the same time, viz. on the failure of Lanusse, consequently the imputation must be made on all.

There was owing to the plaintiff at the time of the failure, 2667 dollars, the balance of the amonnt received out of her father's succession: and 16,666 dollars, the price of the house received by Lanusse for which she had a mortgage on the property in the defendant's possession. These two sums make 19,333 dollars, which, added to the 52,500 dollars paid afterwards, make 71,833 dollars. The payment by the syndics was 29,060 dollars. This imputed to the debts in proportion to their amount requires us to deduct 7821 dollars, from the mortgage claim, and consequently leaves a balance of 11,512 dollars, which the defendant must pay, or surrender the property in his possession that it may be sold.

Various other questions were raised on the argument at bar, and in the briefs since submitted to the court. They have been attentively considered, but it is deemed unnecessary to go into them in detail, and give the reasons why they cannot affect the opinion just expressed.

There is, however, one point which requires particular consideration. The defendant contends that the mortgage cannot be enforced on the improvements which he has made on the lot since it came into his possession.

The objection is founded on the 48th article of the old Civil Code, page 462, which states that the third possessor, "can only claim his expenses and improvements to the amount of the increased value which is the result of the improvements made."

There can be no doubt of the soundness of this objection; nor that the improvements are to be considered in relation to the increased value they give the property at the time of sale, not to the price they or the lot may have cost. The only difficulty is how this value is to be ascertained?

As it is impossible to separate them, and sell each, we think the best mode is that after the sale, experts should be appointed, or any other proof resorted to by which their respective value can be ascer-

tained. And that once known, that the plaintiff and defendant should receive out of the proceeds their proportions; that is to say, the first, the value which the lot bore in relation to the product of the sale; and the second, the value of the improvements considered in that same way; the rents of the property, according to the proportion, which each hold in it, since the date of the notification of the seizure, to be added to the plaintiff's share, and deducted from the defendant's. Civil Code, 462, art. 49.

The only question which remains is in relation to the action of warranty of the defendant against the heir of Soubercase. It is fully made out, and as there is no proof as to the present value of the property, judgment must be given against the latter for the price at which it was sold, viz. 8000 dollars.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and proceeding to give such judgment as in our opinion ought to have been given in the court below, it is ordered, adjudged and decreed, that, unless the defendant within three days from the notification of this judgment pay to the plaintiff the sum of eleven thousand five hundred and twelve dollars, with costs, that the premises mentioned in the petition be seized and sold to satisfy the said sum, with costs in both courts. But it is further ordered that the sheriff, on receiving the proceeds of said sale shall not pay them over to the plaintiff, but that he shall bring them into court, to be paid to the plaintiff and defendant, as the said court may direct; on proof being made to it, how much of the proceeds of said sale arises from the lot independent of the improvements placed in it by the defendant. And it it is further ordered, adjudged and decreed, that the defendant do recover of the heir of Soubercase, the sum of eight thousand dollars, with costs occasioned by the action in warranty.

Moreau and *Cuvillier*, for the plaintiff.

Seghers and *Morphy*, for the defendant.

Macarty *v.* Fanchon f. w. c. *et al.* VI, N. S. 116.

FIRST District.

Same case as preceding.

Judgment cannot be given against the vendor cited in warranty when the evidence does not show the price paid, nor the value of the land, independent of the improvements.

Martel *et al. v.* Tureaud's Succession. VI, N. S. 118.

When the endorser of a note is present, and is a party to an instrument, by reason of which the note was given which he endorses, he cannot claim the protection of the *lex mercatoria.*

An act passed in a parish judge's office does not require any further registry to give a mortgage.

COURT of Probates, Parish of St. James.

MATHEWS, J., delivered the opinion of the court.

In this case the opposing creditors claim a mortgage and privilege on six arpens of land, fronting on the Mississippi, having the ordinary depth of forty, and ten slaves, &c.

For this mortgage and privilege they rely on certain acts passed in notarial form, copies of which appear in the record. The judge of probates decided against these privileges, and from that decision they appealed.

The notarial acts, as exhibited in the record, establish the following facts. In the year 1821, one Vitan sold the land and slaves above mentioned to Rey, retaining in the act of sale a mortgage and privilege of vendor. In the following year, the vendor sold and transferred to Tureaud all the right which he had acquired from Vitan to the property, burthened with the mortgage and privilege aforesaid; under the consent of the original vendor, to whom the second purchaser undertook to pay the price.

[Martel *et al.* v. Tureaud's Succession.]

In the year 1823, Vitan being indebted to Martel, and Hulin, the husband of the opponent Joly, gave to them negotiable notes, endorsed by Tureaud, payable at specified periods, for the amount which he thus owed to them; and to secure the payment of said notes transferred to the creditors by notarial acts, a part of his mortgage and privilege on the land and slaves, which had been sold and transferred in the manner above stated, to the endorser, who was present, and became a party to the acts by which the transfer of mortgage and privilege took place, and thence promised and assumed to pay said notes which he had endorsed, and which are *paraphed ne varieter*. One of these notes, secured by the transfer of mortgage and privilege to Hulin, came by regular endorsement into the hands of Abat, who brought suit on it, and obtained judgment for the amount, accompanied by a decree justifying his right of privilege; which judgment was recorded according to law; and in consequence thereof he is placed on the tableau, as mortgagee creditor having a general mortgage but without any privilege resulting from the act of transfer made by Vitan, and the other two opponents as mere chirographary creditors.

The claims of all these persons are objected to *in toto*, in consequence of alleged default of notice to the endorser. As to the note on which judgment was obtained against him during his lifetime, this objection could surely have no place, unless on suggestion of fraud, which is not made. It is, however, without foundation, in our opinion, in relation to all the claims.

It is true, that endorsers, according to the rules of commercial law, are not liable to pay notes or bills of exchange, unless under certain formalities in pursuing them; amongst which, demand of payment from the maker, and notice of refusal, are essential. But the notes in the present case ought not to be subjected to the ordinary rules of commercial transactions. The endorser was present, and a party to the act made at the same time with them, by which the transfer of mortgage and privilege for security of payment was made; and in that act he expressly agreed to pay the amount for which they were drawn.

The next objection of the privilege claimed, is based on the want of registry of the note and acts under which the claims are made. The act of the territorial legislature of 1810, which provides for the registry of mortgages in the offices of the parish judges of the state, does not point out any particular manner in which they must be recorded. The second section of that law seems to require that they should be fully transcribed and placed in numerical order; it classes them with notarial acts; and among them inquirers would consequently examine. Any deed passed before a parish judge in his capacity as notary, relating to property within the limits of his parish, and containing a clause of hypothecation, and where entered at large on his notarial books of record, will answer all intendments of the law, without any transposition by further inscription. Acts transmitted from a different parish, which are hypothecary, will be transcribed into the same

class of books, for recording in numerical order. The mortgage and privilege claimed by the appellants in the present case, result from the original sale of the property from Vitan to Ory, in which they were expressly retained by the seller. That sale was made by a notarial act, passed before the judge of the parish in which the property was situated, and remains on record in the archives of the place. When the judge became a party to acts by which he acquired an interest in the property, and by which, with his consent, the first seller transferred his right of mortgage and privilege to the appellants, they were passed before justices of the peace and witnesses, and afterwards duly enregistered in the offices of the parish judge on the notarial side of that office.

We are of opinion that these acts have been made and recorded in such a manner as to maintain the lien and privilege on the property sold, to secure payment of the price, and that they have been legally transferred to the opponents in the present case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be avoided, annulled and reversed, so far as it affects the claims of the appellant: and it is further ordered, adjudged and decreed, that the cause be remanded to said court, with instructions to place them on the tableau, as mortgagee and privileged creditors on the land and negroes sold by Vitan to Ory, and from him transferred to Tureaud, since deceased: and it is further ordered, that the appellee pay costs in both courts.

Seghers, for the plaintiffs.

Moreau, for the defendants.

Bradford v. Skillman. VI, N. S. 123.

THIRD District.

The surety on a twelve months' bond cannot be discharged from responsibility on the ground that the law is unconstitutional, in virtue of which the bond was given.

The debt was created since the passage of the law. The plaintiff willingly became the bondsman of a willing purchaser, and executed a bond, in the nature of a recognisance, on which he knew execution would issue *de plano*. It appears to us he cannot complain; *volenti non fit injuria*.

Pimpinella v. Lanusse's Syndics. VI, N. S. 124.

When damages are claimed from syndics for malfeasance, suit ought to be brought against them in their individual capacity.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This case, after having been at rest from the third of July, 1823, to the sixth of January, 1826, was on the latter day disturbed by a motion of Mr. Seghers, counsellor for Pimpinella, alleging him to be a creditor of the estate of the insolvent, who obtained an order from the court below, against the syndics, to file a tableau of distribution. Since the matter has been thus revived, proceedings have cumulated in the case, so as to swell the record to a very considerable size; other parties intervened calling on the syndics for payment of their claims. The first syndics were permitted to resign their office, and new ones were appointed to their place; who, so soon as they were installed, began to complain of every thing which had been done by their predecessors.

The claims of all were settled by a judgment of the district court, in favor of the first syndics, from which their opponents appealed.

The cause has been argued much at length before this court, and many points made on all sides, which, we deem it useless to examine; being of opinion that the greater part if not all of them have been settled over since the 24th of May, 1823, by a judgment of the court below which confirmed a tableau, amended on that day, which had been filed on the 29th of the month preceding. This judgment has not been appealed from, and is now *res judicata* as to all matters contested.

It is true, that the syndics who formerly had the management of the insolvent's estate received and paid out funds belonging to it, since that period; but nothing was ever done by them except under orders, or by commission of a competent tribunal; and in relation to these matters, they are legally discharged from all responsibility in their capacity as syndics.

It is contended, however, on the part of the leading opponent in the case as it now stands before this court, that money having been received by agents of the late syndics, they must account for it to the creditors of the estate. So far as it appears that any sums have come into their hands, they have accounted for them satisfactorily. If their conduct has been such in the appointment of agents, as may fix

on them gross negligence, or palpable mismanagement of the affairs of the estate intrusted to their care, to the injury of the creditors, it is believed they ought to be pursued in their individual capacity, as for damages, and not in the present mode.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Seghers and *Grymes*, for the plaintiff.

Derbigny and *Moreau*, for the defendants.

Ditto *v.* Barton. VI, N. S. 127.

A certificate of the clerk that the record contains a true and complete transcript of all the proceedings had, and of all the documents on file in the suit, does not enable the court to examine the case on its merits.

When a note is annexed to *and made a part of the petition*, there can be no variance between the *allegata et probata*.

THIRD District.

PORTER, J., delivered the opinion of the court.

This is an action on two promissory notes: there was judgment against the defendant in the court of the first instance, and he has appealed.

The two points made by him in this court, are:

1. That one of the notes was stated in the petition to be made on the 5th of April, 1823; and that which was offered in evidence was on the 5th of April, 1822.

2. That one of the notes recovered on, was endorsed over, and no evidence was given of a retransfer.

The second objection cannot be noticed, for none of the evidence given on the trial comes up. The record is not certified in such a way as will enable us to look into the merits. The clerk states that the foregoing ten pages contain a true and complete transcript of all the proceedings had, and of all the documents on file in the suit. This may be true, and yet the record not contain the evidence given on the trial, for if it was not taken down, it could not be on file; and the fact of its not being reduced to writing made no part of the proceedings. It is clear from other parts of the record, that evidence was given, and it is also to be presumed from the verdict of the jury.

[Ditto v. Barton.]

The Code of Practice requires the clerk to certify, that the record contains the evidence adduced. Code of Practice, 586, 602, 603, 896.

The first objection, however, is properly brought before us by a bill of exceptions, but we think it untenable. The note on which suit was brought, was annexed to, and made by express declaration, a part of the petition. So that there was not, nor could there be any variance between the allegation, and the proof. The erroneous description given by the plaintiff in copying the note, was corrected by the note itself. There could not have been any surprise, and the *res judicata* may be well pleaded to another action on this allegation. When both these objects are attained by the proceedings, the defendant can have no just cause of complaint.

We do not think this is a case in which damages should be allowed for a frivolous appeal, and it is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiff.

Bonnet *et al.* v. Ramsay. VI, N. S. 129.

FIRST District.

Prescription is not interrupted by filing the petition, but by its service. See Civil Code, p. 474, art. 52.

Louisiana Insurance Company *v.* Campbell.
VI, N. S. 131.

Judgment of homologation regularly obtained, has the authority of the thing judged against all the creditors who were placed on the bilan.

FIRST District.

PORTER, J., delivered the opinion of the court.

This case comes up from an interlocutory decree of the first instance, setting aside an order of arrest, which had been granted against the defendant.

The facts appear as follows: The defendant applied on behalf of the firm of which he was a member, for the benefit of the insolvent laws, and a meeting of their creditors was ordered at a notary's office. They attended, accepted the cession, and voted for syndics. Before the proceedings were closed, one of the creditors made the following proposition: "James M. Reynolds agrees to endorse the notes of William R. Campbell, (the insolvent,) at six, nine and twelve months, to be given to the respective creditors of Chalmers & Campbell, in the proportion of forty per centum, in lieu of their respective claims approved on the following conditions:

"The creditors to accept the surrender of the property and effects of Chalmers & Campbell, as already tendered to them, to transfer their right in the said surrender, as also their respective claims, to the said James M. Reynolds; and to grant a full discharge of their said debts to William R. Campbell, in consideration of receiving said notes. This proposition shall be binding on James M. Reynolds, only so soon as the consent, in writing, of all the creditors shall have been obtained, and not otherwise."

The creditors who had appeared before the notary accepted the proposition by an instrument in writing, in which, after acknowledging to have received the notes of Campbell, endorsed by Reynolds, they declare that in consideration thereof, "they assign to the said James M. Reynolds all their rights to the property surrendered by the said William R. Campbell and all right of action against Chalmers & Campbell; they granting to the said William R. Campbell a full and complete release as to them, the said creditors, and hereby appointing and constituting the said James M. Reynolds and William R. Campbell their attorneys irrevocable, giving, and hereby granting unto the said James M. Reynolds and William R. Campbell, jointly, and to each of them separately, all the full power of these appearers to sell and dispose of the property surrendered as aforesaid, either by

public auction, or private contract, and collect all the debts due to the said Chalmers & Campbell, for the use of the said James M. Reynolds," &c.

On these facts, the judge *a quo* was of opinion that the debtor having made a tender of his property and the creditors having accepted it, that he should be freed from arrest at the suit of the present plaintiffs; that if the creditors chose to manage the property themselves, instead of appointing syndics to do it for them, it was not the fault of the insolvent; that he did all that was incumbent on him to do, by tendering the property, and that whether the plaintiffs are bound by the transfer to Reynolds, is no concern of the defendant.

This cause is now before us on a rehearing. When it was first decided, we were of opinion that the proceedings were not binding on the plaintiffs as it did not appear that they were returned into court and homologated. Evidence which was not placed before us at first, has now been produced, which shows that the *process verbal* of what took place before the notary was returned into the district court, and that no opposition was made to the confirmation of what had been there agreed on. This circumstance in our opinion precludes the plaintiffs who were put on the bilan and were parties to that suit from contesting the regularity of their proceedings. The judgment of homologation is conclusive on them so long as it stands unreversed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Grymes, for the plaintiffs.

Livermore, for the defendant.

Livermore *v.* Morgan's Syndics. VI, N. S. 134.

An agent cannot, on pretence of explaining a former deed passed by him, convey by a second instrument, property not contemplated at the time of the sale.

He may, by a subsequent deed, correct verbal errors in the first: whether the error in the first were verbal merely, it should be left to the jury to judge.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action against the defendant for setting up a title to a lot of ground in the parish of New Orleans, of which, the plaintiff avers

he is the owner. There was judgment in his favor in the court below, and the defendants appealed.

Several bills of exceptions were taken on the trial by the defendant: we pass over the first and second without further observation, than that in our opinion the judge below decided the points presented by them correctly. The main question in the cause, as it now stands before us, is on the third exception taken to the decision of the court, on evidence offered by the defendant in support of his title.

He first produced a deed of sale, executed by the attorney in fact of the person under whom he claims the premises in dispute. In this sale, the description given of the property limits it to certain streets therein named, and does not carry the boundaries to the Mississippi. Some time after, the defendant obtained from the agent who had sold to him, a declaration, or as it is called, a supplemental act, executed before a notary, in which, after reciting that he had sold to the defendant a lot as described in the act of sale, and that since that time several changes had taken place in the names of the streets, and the distribution of the adjacent property, he declared that to avoid difficulties and mistakes, regarding the extent, limits, and boundaries of said lot, it had been sold and conveyed by him with the same extent it was owned by the person who had sold to his principals, namely, with sixty feet front to the Mississippi.

The defendants assign as a reason for this instrument, that which is given in it: the wish to make the conveyance clear and explicit. The plaintiff urges, that no change had taken place, in the names of the streets, nor in the distribution of the property; that the whole was an after thought: an attempt to carry into effect by indirect means a transfer of the batture lying in front of the property originally conveyed. And he further contends that this declaration of the agent could not have that effect: of that opinion was the court of the first instance.

It is very possible the plaintiff may be correct in this position, but we think the instrument should have been permitted to go to the jury for what it was worth. If the mistake in the first deed was merely verbal, we think the agent of the principal and the purchasers might explain, and correct it by a subsequent act, though they could not under a pretence of explaining a former instrument, convey property not contemplated at the time of the sale.—Whether the act offered in evidence was of the former or the latter description, was to be judged by the jury after it had been read to them in evidence, and compared with the other proof given in the cause.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, that the case be remanded for a new trial, with directions to the judge not to reject the instrument of writing referred to in the bill of exceptions; and it is further ordered and decreed, that the appellee pay the costs of this appeal.

Livermore, for the plaintiff.

Eustis, Grymes and *Hennen*, for the defendants.

Peet *et al.* v. Morgan.* VI, N. S. 137.

An action lies against a sheriff, who seizes goods other than those of the defendant in execution.

A plaintiff in execution cannot seize property of the defendant in the hands of third persons, on the ground that the sale to them is fraudulent.

But when the conveyance is *sous seing privé*, he may if the sale was *antedated*.

No man can protect himself upon a trespass by averring himself agent of another, unless that other had authority to do the act.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action against the sheriff of the Parish of New Orleans, for seizing the property of the plaintiffs. The defence is, that the goods mentioned in the petition were the property of one M'Devitt, against whom an attachment has issued, and that if any sale of them had been made to the plaintiffs, it was false, fraudulent, simulated and collusive.

On this head, the defendant offered testimony to establish the facts set up in his answer. The court refused to receive it, and he excepted. This rejection of his evidence was followed by a verdict against him, and judgment in pursuance thereto, from which he has appealed.

In this court he has made two points: First, that no action lies against a sheriff, for a mistake in seizing the goods of a person other than the defendant in execution; and secondly, that the court erred in rejecting the testimony offered, to prove the sale was simulated and fraudulent.

1. The only reason offered for this doctrine is, that by the laws of Spain various provisions existed, by which the party whose goods were seized might oppose their sale; and 2. that the plaintiff under that system pointed out the goods that were to be seized; consequently, that he alone was responsible.

The first of these reasons is neither incompatible nor inconsistent with the right of suing also for damages. The second is not at this day the law in Louisiana. It is the duty of a sheriff when a writ is put into his hands to go and execute it, whether the plaintiff is here or not to point out the property. Such is the necessary consequence of the language used in the writ, and the directions of the statute. It is contended the officer is nothing more than the agent of the plain-

* See this case, *post*, p. 580.

tiff: admitting he is not, no man can protect himself upon a trespass, by averring he is the agent of another, unless the person whom he represents had authority to do the act complained of. Even if the doctrine for which he contends were true, he has not brought himself within it, for he has not shown that he was directed by the plaintiff in attachment to seize the goods. 2 *Martin's Dig.* 166, 168 and 169.

The second point presents the question, whether the plaintiff had a right to seize these goods, before he brought an action to set aside the sale. It has been determined in a variety of cases decided in this court, that a creditor had not a right on an allegation of fraud to treat the alienation made by his debtor as null and void, and seize at once, and by short hand, the property conveyed by him. Since that doctrine has been recognised by this tribunal, there have been, it is true, cases, where the parties have chosen to put their respective rights at issue in an action brought for the seizure, and the court has not declined to pass on them, when they did so. The present case, however, presents the exception on the part of the vendee, and the argument on the behalf of the creditor has called our attention particularly to the correctness of this doctrine; the extent to which it may be carried; and the limitations to which it is subject. 9 *Martin*, 648; 3 *N. S.* 338. Babarin *v.* Descontreaux. Henry *v.* Hyde.

Of its correctness the court entertains no doubt. It is clearly supported by authority, and it is sanctioned by reason and utility. The principle on which it rests is, that men are presumed to act honestly, until the contrary is proved: that the conveyances alleged to be fraudulent are *prima facie* correct and fair; and that it is improper in opposition to these presumptions, that the creditor should exercise rights that could properly belong to him, only in case the acts of his debtor were null and of no effect. Should a contrary doctrine prevail, in many instances sales which were alleged to be fraudulent, might turn out to be *bona fide*, and the purchaser be deprived of the use and enjoyment of property which was honestly his. In the uncertainty which must prevail until the matter undergoes a judicial investigation, it is certainly the wisest course, and the one most conducive to general utility, to consider the thing sold as belonging to him, in whom the title is vested.

But in the application of these principles, it will be readily perceived, that though it properly governs all cases where the conveyance is by public and authentic act, its utility is not so manifest when the alienation is by a private instrument. The former is presumed known to the creditor. Its date is established, and he acts, in direct violation of the presumptions which these facts create, when he treats it as a nullity, and proceeds to seize the property conveyed by it. In the latter the sale is unknown to him, the conveyance is of no certain date, and no notice is given that a transfer has been made of the property.

If the date of the conveyance is subsequent to the seizure by the

creditor, it is a self evident proposition that it cannot be objected to his right of seizing, that he did not bring an action to set aside the sale. If the rules of law recognise, as they do, no date to an act *sous seing privé*, but that of the day on which it is opposed to a third party in court, then the proposition is equally evident, that it is not a good defence to make to the seizure, that suit was not brought to avoid the alienation. In both instances the answer is conclusive, that the creditor could not, by an action previous to the levy made under execution, set aside acts which were not made until after the levy took place.

But if, to this rule of law in relation to the date of acts *sous seing privé*, the party claiming the goods answers, as he may, that he can prove by circumstances dehors the act that it was really made at the time it purports to be executed, it is necessarily open to the creditor, to rebut that proof, by other testimony, which will establish that it was not.

That evidence the plaintiff was under the necessity of producing here, and in refusing the defendant the right to show that the sale was simulated, that is made at a date different from that which it purported, we are of opinion the court erred.

The only case, in which this court has sustained the objection to a seizure when the sale was made by act *sous seing privé*, is the case of Richards *v.* Nolan, but that case was heard *ex parte*, and the point now raised was not presented to our consideration. 3 *N. S.* 336.

Being, therefore, of opinion that the court below erred in rejecting the evidence, we cannot go into the questions made by the appellee. They will be proper subjects for consideration if the cause should again come before us on the merits.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and it is further ordered, adjudged and decreed, that the cause be remanded to the district court with directions to the judge not to refuse evidence which will show the date at which the sale relied on by the plaintiff was really made. And it is further ordered that the appellees pay the costs of this appeal.

Hennen, for the plaintiffs.

Watts and *Lobdell*, for the defendant.

Hamilton *v.* Hamilton *et al.* VI, N. S. 143.

A trifling variance, between the expressions used by the testator, and the words written by the notary, is not fatal.

The clause declaratory of the testator's sanity is a mere formula.

The notary may ask of the testator in what manner he wishes to dispose of his property.

Sales of deceased persons' estates are made with reference to the inventory and appraisement.

A child must collate the value of the hire of slaves lent to him by his father, to enable him to procure others.

But not that of one sent to attend the child as a domestic.

COURT of Probates, Parish of West Feliciana.

MARTIN, J., delivered the opinion of the court.

This is a suit for the partition of the estate of the late J. Hamilton, instituted by his widow against his heirs.

W. S. Hamilton, a son by a first marriage, complains of the admission of the will to registry, alleging the unsoundness of the testator's mind, and because it was not made in the manner required by law.

We do not think the judge of probates erred in overruling both these objections.

It is true, the testator had, for several years, suffered from the consequences of an apoplectic attack, which terminated in palsy. Yet the testimony shows that his mental faculties were not so affected as to disable him from making a will. The principal part from which the opposite conclusion could be rationally drawn, is, his running to persons near him for information of the name of some of his children, and his apologising for this circumstance, by saying they had such long names that by going over them he had got confused. The record shews he had six children, all of whom, but one, had more than two names, and one of them, five, being called John Walsh Andrew Jackson Hamilton.

On the second ground, it is urged that every word in a will must be dictated by the testator and his very expressions taken down. It is next shown that the amanuensis employed to write the will has deposed that the clause declaratory of the testator's sanity was not dictated by him, and that with regard to another part of the will, to the question whether he had taken down the very words of the testator, the amanuensis answered, that the testator did not speak word by word what is written, but being asked what disposition he meant

to make of his property, answered, in substance, in the manner that is written.

We consider the clause declaratory of the testator's sanity, as a mere formula, like the words "In the name of God, Amen," not essential to the will, mere words of form with which notaries are in the habit of prefacing the declaration of the testator's intentions.

We are referred to 5 *Toullier*, 350, where it is said that to dictate is to pronounce, word by word, what is designed to be written by another. Hence he concludes that a will cannot be made by signs or interrogations.

This able writer does not say what, or whether any variance is fatal. On the contrary, from the examples he puts, we understand the meaning he intends to convey is, that the testator must express his intention orally, not by signs, but by words; and that these words are uttered spontaneously, and not upon suggestion. Had the proposition he meant to illustrate been that contended for by the defendant, this able writer would not have referred to so remote an example.

We know that there have been decisions in some courts of France, requiring the utmost precision in the amanuensis; but we are unable to adopt this doctrine in its utmost extent. It is desirable to have, as much as possible, every word taken down from the testator's mouth; but we cannot adopt the unqualified proposition, that the slightest variation is fatal, as for example, the substitution of the pronoun which instead of that. This would destroy almost every will.

The interrogations, which *Toullier* means to exclude, are the direct or indirect ones, relating to any particular article of property, or any particular person, as the object of the testator's benevolence: not the interrogatories—What are your intentions? How do you wish to dispose of your property? which are only notices of the notary or amanuensis being ready to write, and waiting only for the directions of the testator.

The court of probates refused to allow the plaintiff any thing on account of certain bonds, deeds or trust, marriage settlement, or mortgages executed in North Carolina. She is not an appellant, and her counsel in this court has not prayed for the revision of the judgment in this regard.

The defendant, W. S. Hamilton, claims from the estate certain sums of money alleged to have been received by the deceased, as his guardian. On this part of the case, we think justice demands that it be remanded for further examination, and that this defendant be allowed to procure and introduce further proof; that on record, establishing the guardianship, and rendering it more than probable, that money was, or might have been, received by the deceased in his capacity of guardian; and it would be impossible for us to act on this part of the case, without running the risk of doing material injustice.

His claim to be considered as a joint purchaser with his father, of the Hart's estate, we think was properly disallowed; the record

establishing that arrangements were made between them, totally inconsistent with a joint ownership.

With equal correctness was the clause for reimbursement of money disbursed on improvements on the part of the estate purchased by this defendant disallowed.

Sales of the estates of deceased persons are made with reference to the inventory and appraisement that necessarily precede them. In the present case, the improvements, not having been made by the testator, were considered justly as no part of the estate, and not considered at all in the appraisement. All the immovable property was purchased by some of the parties to the present suit, who being so to the inventory and appraisement, must be presumed to have acted with full knowledge, and in accordance thereto, and there was no need as to them, of a declaration of the sale of the land being made without reference to the improvements.

This defendant, who was before the sale a creditor, for these improvements, became, by his purchase, the debtor of them, and his demand was thus extinguished by confusion.

We think this defendant is bound to collate the value of the labor of the six or seven slaves which were sent to him by the deceased for the purpose of enabling him, by the use of them, and other resources, in raising a sum of money, to be employed in the purchase of slaves for his own use. Had the testator given the negroes, or money to purchase them, what was then given would be a proper object of collation.

The case is different with regard to the slave Bristol, who was sent to wait upon the defendant. The bailment was a precarious one; and the comfort the defendant derived from the attendance of this slave on him, is not a proper object of collation. His co-heirs, who remained in the paternal mansion, deriving, likely, an equal advantage from the service of the servants kept there for the comfort of the family.

There is no evidence to support a charge against this defendant for the value of the slaves who ran away from North Carolina.

We think he is chargeable for the fair value of the use, or a rent for the part of the premises he occupied.

It is, therefore, ordered, adjudged and decreed, that so much of the decree as charges the defendant, W. J. Hamilton, with the hire of the negro Bristol, and the price of negroes Jim and Chloe, be annulled, avoided and reversed; and the claim of the widow and other heirs against him, be disallowed and rejected; that the case be remanded to the court of probates, with directions to allow a sufficient time to the defendant to introduce proof of his claim against the estate for the balance due by the deceased, as his guardian, and likewise, to receive proof of the alleged surrender of the particular estate on which the estate in remainder of the mother of the defendant depended, in order to ascertain the claim of the deceased to the profit of the estate as a tenant by the courtesy; and in the examination of the evidence to be so produced, to settle the balance, if any, due by the deceased,

as guardian to the defendant, and his claim for the rents of the house in New York; and after this, to proceed to the final partition of the estate, in the manner as it was done before, modified by the result of the settlement of the guardian's estate, and the settlement of the claim for the rents of the aforesaid house, and the opinion of the court in the present decree, the costs to await the final judgment.

Watts and *Lobdell*, for the plaintiff.

Smith, for the defendants.

Flower *v.* Lane *et al.* VI, N. S. 151.

The party in whose favor a stipulation is made by another, may bring an action to enforce it.

FIRST District.

PORTER, J., delivered the opinion of the court.

The plaintiff was creditor of the steamboat Mandan, in the sum of 483 dollars and 88 cents, subsequent to the time when the debt was contracted, and previous to the period when it fell due, one of the partners who owned half the boat, sold his interest in her to the defendants. In the act of sale which was passed before a notary public, there was a clause by which the purchasers stipulated, "that they shall assume, and they do hereby assume the payment of all claims now due to the said steamboat, without any recourse against the vendor or his heirs, by reason thereof, hereby obliging themselves and their heirs to warrant and keep him safe and harmless from all such claims as fully to all intents and purposes, as if he had never possessed any interest in said boat."

The court below was of opinion that under this agreement the defendants were only responsible for the partner's share of the debts, whose interest in the boat they had purchased, and it gave judgment against them accordingly for the one half of the note sued on.

From this judgment the defendants have appealed and the plaintiff on his part has prayed that it may be so amended that he may recover the whole amount of the obligation.

So far as the judgment affects the defendants there can not be doubt: it is correct. The agreement contained what is termed in our

[Flower v. Lane et al.]

law a *stipulation pour autrui*. The party in whose favor that stipulation was made had most clearly a right to bring an action in his own name to enforce it. And the defence set up that the seller had no right to the boat, and that the defendants acquired nothing by the purchase, can not avail them, for they have given no proof that the allegation is true.

Although the correctness of the judgment in rejecting one half the plaintiff's demand, is not so clear as that part which condemns the defendant, yet we are of opinion that as to it too, the judge did not err. It is true, the promise to pay all the claims on the boat would, if taken alone, support the appellee in the position that all this debt must be paid. But the whole contract shows that nothing more was contemplated by the parties than that the defendants should pay all the debts due by the boat for which their vendor was responsible. Civil Code, 270, art. 63.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Slidell, for the plaintiff.

Ripley and *Conrad*, for the defendants.

Buhols, Wife of Bourguignon, *v.* Boudousquie. VI, N. S. 153.

When possession has followed a sale made by an agent, for twenty years, his authority may be presumed.

FIRST District.

PORTER, J., delivered the opinion of the court.

On the trial of this cause, which was a suit in relation to the boundaries of land owned by the parties, the plaintiff offered in evidence, a sale made twenty-three years ago, to the person under whom she claims.—The instrument offered was by public act, but was executed by an attorney in fact of the owner, whose authority to sell was evidenced by a power, *sous seing privé*, annexed to the conveyance. The defendant objected to an introduction of the bill of sale, unless the authority of the agent to make it was first proved. Of this opinion was the court, and the plaintiff excepted.

[Bubols, Wife of Bourguignon, v. Boudousquie.]

The principle on which the objection was made and sustained is certainly correct, but we think, subject to an exception in cases like this. After possession for twenty-three years, a period of time sufficient to enable the purchaser to acquire by prescription against the owner, the instrument should have been permitted to go to the jury, leaving it to them, under the circumstances, to say whether his assent to the contract must not be presumed. The bill of sale was authentic. The possession was public and ancient. The case, therefore, comes completely within the instances put by the writers to illustrate the maxim, *Semper qui non prohibet aliquem pro se intervenire, mandare creditur. Digest, liv.* 50, *tit.* 17, *law* 50; *Pothier Contrat de Mandat, No.* 29 *et* 99; *Curia Phill. verbo Factores, No.* 2.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the case be remanded, with directions to the judge *a quo* not to reject the deed from Foucher to Parant, although the plaintiff may not prove the authority of Andry to make it: and it is further ordered, that the appellee pay the costs of this appeal.

Ripley and *Conrad*, for the plaintiff.

Hennen, for the defendant.

Mayor *et al. v.* Peyroux. VI, N. S. 155.

PARISH Court of New Orleans.

If the corporation of New Orleans neglect enforcing their ordinances the farmers of their duties may claim a diminution in the price of adjudication.

Woodrow *v.* Hennen. VI, N. S. 156.

An allegation that it was in the defendant's power to collect money may be supported by proof that he had collected it.

An attorney at law who takes one debt for another placed in his hands for collection, is responsible to his client in money from the date of the transaction.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover from the defendant a certain sum of money which the plaintiff alleges he undertook to collect or cause to be collected for her benefit, on a judgment which had been regularly transferred to him for that purpose. She charges him with want of legal diligence, in not having proceeded by execution on said judgment, in the most prompt and summary manner, as authorised by law. The defence is due diligence used without success in obtaining the money. The cause was submitted to a jury in the court below, who found a verdict for the plaintiff, and judgment being rendered according thereto, the defendant appealed.

The facts of the case as shown by the record, seem to be the following. The plaintiff placed in the hands of the defendant for collection, a note payable to her, subscribed by one J. C. Brent, amounting to 2455 dollars. To effect the payment of this debt, he received from Brent by assignment, a judgment which had been obtained by the latter against J. Erwin, for 3250 dollars, the judgment of which, it is alleged might have been legally enforced previous to the commencement of this suit.

The evidence shows that this judgment was finally settled and discharged by Erwin, the defendant in execution, in a transaction between him and the agents or attorneys employed by the defendant, to cause it to be collected, in the month of June, 1826.

In the course of the trial in the court below, a bill of exceptions was taken by the counsel for the plaintiff, to an opinion of the judge *a quo*, by which he rejected testimony offered to prove the actual collection of the money from Erwin, on the ground that the petition contained no allegation to that effect. We think the judge erred in rejecting this testimony. It is alleged in the petition that it was in the power of the defendant to have caused the money to be collected, previous to the institution of the present action. To prove the truth of this allegation, it is difficult to imagine stronger evidence, than that which shows that the collection was really made. It is true that it

was effected by a compromise, in pursuance of which a part of the sum did not probably come into the hands of the appellee until since the commencement of this suit: but according to legal intendment, he must be considered as responsible to the plaintiff from the date of the transaction made by his agents, as that was entered into without her consent; or at least, none is shown. The evidence of the case does not establish any negligence on the part of the defendant. His diligence, however, cannot authorise him to retain the money which he has collected; it must legally be presumed to have been collected for the plaintiff. A tender of the amount in the court below, under all the circumstances of the case would probably have relieved him from costs; but that was not made; the judgment of the district court ought to be affirmed, with costs.

Buchanan, for the plaintiff.

Hennen, for the defendant.

Pugh *v.* Erwin. VI, N. S. 159.

FOURTH District.

If the record does not enable the court to examine the case, the appellee may have the judgment below affirmed with damages.

The appellant cannot discontinue his cause in the Supreme Court when the case is brought up by the appellee.

Hermann *v.* Smith. VI, N. S. 161.

Where one not a party to a suit appeals, and his right to do so is denied in the Supreme Court, the case must be remanded, in order that the issue so joined be tried in a court of original jurisdiction.

FIRST District.

PORTER, J., delivered the opinion of the court.

This case has been brought up under the 571st article of the Code of Practice, by which the right of appeal is given to persons not parties to the cause, when they allege they have been aggrieved by the judgment.

The fact of the appellant being aggrieved by the judgment, and his right to appeal, are put at issue by the answer.

Consequently this fact must be tried, before the merits can be investigated; and it is conceded, that we have no power to hear the witnesses, and decide on matters that were not passed on in the court below. To do so, would be an exercise of original, not appellate jurisdiction.

But the parties differ widely as to the consequences which should follow from this want of power. The appellee urges, that as he has denied the right of the appellant, the appeal ought to be dismissed. The latter contends the cause should be remanded for proof, and judgment in the court of the first instance.

And of the latter opinion is this court. The article of the Code of Practice already cited, contains no provision by which the appellee can be brought into the court below, and the fact tried. The only way in which issue can be formed is by the answer on the appeal. The powers with which this court is vested, forbidding the exercise of original jurisdiction, it cannot try the issue so formed. It can, therefore, do only one of two things, remand the cause, or dismiss the appeal. We think it is our duty to remand. By this course we give the law effect. By the other we would make it a dead letter, for the denial of right by the appellee would in every case defeat the appellant. Such was the opinion we expressed in the case of the Corporation of New Orleans *v.* Paulding, 4 *N. S.* 614.

It is, therefore, ordered, adjudged and decreed, that this case be remanded, with directions to the parish court, to try the issue joined between the appellant and appellee, as to the right of the former to appeal.

Denis, for the plaintiff.

Morphy, for the defendant.

Carraby *v.* Davis. VI, N. S. 163.

If a defendant who is about to absent himself, be arrested on an affidavit that he does not leave property to satisfy the demand, he may be discharged on showing he does leave enough to pay that sued on, though it may be doubtful whether he is able to pay all his debts.

FIRST District.

PORTER, J., delivered the opinion of the court.

The defendant was arrested on an affidavit that he was indebted to the plaintiff, and that he was about to remove from the state without leaving in it sufficient property to satisfy the demand.

A rule was taken on the plaintiff to show cause why the order of arrest should not be set aside, and the court after hearing testimony made the rule absolute.

The principal ground on which the correctness of this decision has been assailed, is, that the evidence shows the defendant to be in embarrassed circumstances; that if all his debts were enforced against him he would be insolvent. This fact is not clearly made out by the proof, and a great part of the debts do not fall due for years. But admitting it were, the law does not speak of a man not having property to pay all his debts but that he has not enough to pay that sued on. Many are the instances in which a debt is collected by execution, where the party is insolvent. Were it, however, otherwise, it might be sufficient for us to say, that laws which deprive men of their liberty on the oath of their adversary, ought to receive a strict construction, and should not be extended to any case not coming within the letter.

But this construction is not only in consonance with the letter, but in pursuance to the spirit of the law. The case has been argued, as if it were the object of the enactment to obtain security for the debt. But this is clearly erroneous. The intention of it was nothing more, than that the creditor should have the body of his debtor, in case there were not goods enough to satisfy his claim. Now every object of the law is attained by the construction we put on it, in case a man who has a good deal of property in his hands, but who owes to the amount of it, leaves the state. If he remains absent the execution that may issue on the judgment obtained against him, can be levied on the property behind, and the debt will be satisfied. The insolvency cannot stand in the way of the recovery, nor diminish the security unless the debtor will return and file his bilan, and the mo-

ment he returns into the state to do so, his body is subject to the process of the creditor. Take it therefore which way we will, the purpose for which the statute was made is fulfilled. The creditor has his goods unless his debtor should come back to make a cession of them, and then he has his body. In a word, the creditor has every security he would have had, if the removal had not taken place, and we are most clear the statute had in view nothing more.

As, in the case before us, there is proof that the defendant leaves behind him sufficient property to satisfy this debt, and as we see nothing to prevent the creditor being satisfied out of it, unless the debtor should return and file his bilan, we are of opinion the judge below committed no error in discharging the order of arrest. Code of Practice, 214.

It is, therefere, ordered, adjudged and decreed, that the judgment of the court below be affirmed, with costs.

Seghers, for the plaintiff.

Eustis and *Canon*, for the defendants.

Erwin *v.* Porter. VI, N. S. 166.

FIRST District.

Oral evidence cannot be given of the contents of a paper in the hands of an adversary, without notice to him to produce it on the trial.

Nolte *et al.* *v.* Their Creditors. VI, N. S. 168.

Material-men and workmen, employed by the undertaker of a building, have no privilege of their own; but may avail themselves of it.
This claim is not postponed to the reimbursement of advances not stipulated for.
Neither of them acquires a preference over the other by a seizure.

FIRST District.

MARTIN, J., delivered the opinion of the court.

From the decree of homologation of the tableau of distribution, several creditors have appealed.

The first is Miller. The district judge was of opinion he had waived his privilege, and disallowed it: he claims as a material-man, and as having paid workmen 4696 dollars, 21 cents.

1. The first objection to his demand is, the waiver of his privilege. The evidence of this waiver results from a writing of the 9th of February, 1826, by which Miller acknowledged that the lien he obtained by the assignment of Reynolds, the undertaker of the defendant's building, applied only to a sum of 1535 dollars, 14 cents, to be paid, in the last instance, after all the other claims have been satisfied, and that the insolvents were entitled to a priority of record for 6000 dollars.

If the sum of 1535 dollars was not to be paid until all other claims are satisfied, all these claims are privileged against it, and it has no privilege; the district court, therefore, correctly decided the privilege was waived.

As to the other items of this creditor's claim, which are all subsequent to this writing, the waiver cannot extend.

2. It is next objected, that material-men and workmen, claiming a privilege for more than 500 dollars, must record their titles. Civil Code, 274. We think the Code here requires the record of the contract, on which the undertaker's claim arises. Art. 2743. It is he alone has a privilege; the material-men and workmen whom he has employed, have no privilege of their own in the building; they are only permitted to avail themselves, *pro tanto*, of his privilege.

3. It is further objected, that the undertakers have not completed the building; and the last payments of both contracts were not demandable till the building was completed. Experts have viewed the building to ascertain the facts, and are of opinion, that what remains still to be done, is of the value of 915 dollars. The contract was for above 38,000 dollars; and it is not alleged that any damage

has occurred. The deficiency, not exceeding 2½ per cent., is so minute a matter, that all the syndics are entitled to is the retention of the sum. Art. 1920.

4. The syndics urged that they were compelled, in order to have the building finished, to make greater advances than were at first contemplated; the undertaker not being able to go on without them; and that, therefore, these advances beyond what was stipulated for, are no infraction of the rights of material-men and workmen, to be paid out of the deferred instalment; because without this the undertaker could not have proceeded, and the last instalment would never have become due.

The record shows no proof of this necessity; it is merely alleged. The law, however, has secured to material-men and workmen a right to a fund formed by the contract; and this right cannot be affected by any act of both parties, or either of them.

5. It is further objected, that at the foot of the supplemental contract, the undertaker acknowledged the receipt of 20,566 dollars, on this contract, and that of the 6th of August, which is all that, by both contracts, was payable before the completion of the building; and the last or supplemental contract speaks of payment to be made before the completion of the work; that, therefore, the parties must have understood that more had been paid on the original contract than had been stipulated for: this conclusion being necessary to give some effect to the clause which relates to payments to be made on the second; and that Miller, who intervened in the second contract, as the undertaker's surety, cannot hold that the sum thus acknowledged to have been received left nothing to be paid before the completion of the building.

While the parties admit that the money acknowledged to have been received, was paid on both contracts, we cannot conclude that nothing was paid on one of them, and when we seek to find how much was paid on either, we have no clue to direct us; and if the sum cover all that was to be paid on both, we must conclude the acknowledged payment was so made.

It is true, this leaves the clause in the last contract relating to payments to be made thereafter, before the completion of the building, inoperative. But to give it effect we cannot disregard the positive assertion of the parties of past facts, and without any legitimate rule ascertain what was paid on either contract, and come to the conclusion that more was paid than ought to have been.

6. The syndics urge that the obligation of their insolvents to pay more than they engaged to pay, because they made some payments too soon, is in the nature of a penal obligation which does not bind syndics.

A creditor, whose debt has been incautiously paid to a person not authorised to receive it, may still demand it from his debtor; and we cannot see how, in case of insolvency, the debt could not be demanded from the syndics; the illegal payment could not avail the debtor, and it cannot his syndics.

7. Miller claims a privilege above all the creditors because he first seized. The subrogation of the material-men and workmen, to the claim of the undertaker, exists before the seizure; from the Code speaking of the subrogation after having spoken of the seizure, we cannot mistake the cause for the effect; the subrogation gives the right to and is the cause of the seizure. All material-men and workmen are subrogated, and neither can by a previous seizure destroy the rights of another.

Parker is another appellant. His claim is supported by a judgment against the undertaker and the syndics, and corroborated by evidence below. He furnished materials and has a privilege himself.

Cotton's heirs are appellants also—they were refused a privilege, which was claimed on the ground that the payment of a sum of money of theirs, in the hands of the insolvents, who had collected it for them, was enjoined; that thus the insolvents became judiciary sequestrators or depositaries, and that against such the law gives a privilege. Civil Code, 546, art. 26.

It would require much consideration to induce us to say that the service of an injunction, so locks the property of the party, as to prevent the free alienation of it. Garnishees are in the same situation; but we think the case demands no opinion on this head.

On the dissolution of the injunction, the insolvents were as completely in the possession of the money, as agents of the heirs, as if the former had not been enjoined from paying it to the latter. There was no necessity, indeed no utility, in an actual delivery over of the money from the insolvents, in the capacity of the party sued with the injunction, to the same persons, as that of agents or the heirs. If the latter suffered their money to sleep in the insolvent's hands, they did so at their peril.

The dissolution of the injunction left it, to every possible intent and purpose, as it was at the service of the injunction.

These appellants can not therefore complain of the decision of the judge *a quo*.

We are also to examine such claims against the insolvents as are contested by the appellants, but previously we must inquire into that of one of the creditors, Lerond, who has made himself an appellee, and prayed that the deed may be amended in his favor, viz: Lerond.

His claim is founded on a judgment and proof of his work on the building; he is therefore entitled to a privilege.

Withers's claim is opposed by the appellants. It rests on a notarial act, by which the undertaker transferred him a claim against the insolvents to secure payment for timber furnished for their building. The objection is, that the assignment makes no proof against the creditors; but evidence of the supply has been introduced. Febrero says, that when the writing, subscribed by the insolvents, is strengthened by *adminiculos*, or proof, destroying the presumption of fraud, it is evidence. *Part.* 2, 6, 3, *ch.* 2 *s. n.* 12 *Mart.* 165.

It is objected she assignment was made *en tiempo inhabil* and

could not give a preference. The privilege of preference does not arise from the assignment, but from the creation of the debt which the assignment was intended to secure.

Tattel's claim is also objected to, and a priority claimed over him because he made no seizure as others did. This point has been disposed of in examining Miller's pretensions.

Duralde's claim is opposed but no evidence is adduced against it, and it was fully made out by proof.

Beckman's claim, which is also objected to, arises from his endorsement and the subsequent payment of a note of the undertaker's to Barron & Co. in payment of slates employed in the building; as a surety for the undertaker, he was bound to pay the amount of the note, and doing so, paid for the slates. Barron & Co. were privileged creditors, being material-men.

It is objected they had no privilege, as they took the note in payment, and their claim for the slates was novated. Of this we see no evidence, and we are not allowed to presume it. Civil Code, 2196.

The claim of the Parfaite Union Lodge does not appear to have been opposed and is on the tableau.

The claims of Gurley and Guillott, and Perrault and Pascal, can not be distinguished from other material-men or workmen, and must be paid in concurrence with these.

So must the claim of Beckman, unless proof should show it to be for the completion of work left unfinished by the undertaker.

The judge below erred in recognising any preference under the undertaker's assignment. He had been paid every thing he could claim before the completion of the building, and therefore could give no preference, the law having forbidden anticipated payments.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, with directions to modify the tableau according to the principles herein established.

WESTERN DISTRICT, SEPT. TERM, 1827.

State *et al.* v. Wilson. VI, N. S. 178.

The Opelousas Steamboat Company can not prevent other steamboats than their own from landing passengers at one of the *termini* of their ferry, if they have not been taken at the others, or on the route between the two.

FIFTH District.

MARTIN, J., delivered the opinion of the court.

Two actions were brought by the plaintiffs against the defendant, for the recovery of penalties alleged to have been incurred by him for violations of the privileges of the Opelousas Steamboat Company. The petitions allege that, by the act of incorporation of that company it is provided, that if any person or persons shall set up, keep and maintain, in opposition to the said association, any vessel propelled by steam, and shall transport therein any person or persons, for hire, profit, or emolument, from Opelousas river to Placquemine, or from Placquemine to Opelousas river, along the route contemplated by the act of incorporation, &c.; and that the defendant kept up and maintained, a certain vessel propelled by steam, called the Dolphin, and transported persons for hire and emolument, from Placquemine to Opelousas river, and from Opelousas river to Placquemine.

The defendant pleaded the general issue and other pleas; the suits were consolidated; there was judgment in his favor, and the plaintiffs appealed.

The evidence shows, that the Dolphin made several trips from the city of New Orleans to the place of the landing on the Opelousas river, which is one of the *termini* of the ferry granted to them by their act of incorporation, and that she necessarily passed along the route contemplated by the act of the legislature between the two *termini* of the ferry.

The privilege of the company must be commensurate with its duties; the latter consist in the transportation of persons, animals and goods, from one of the *termini* to the other. They alone can take passengers and goods at one of the *termini*, to transport them to the other. But as the company cannot be compelled to transport persons or goods from Opelousas river to New Orleans, or from New Orleans to Opelousas river, they cannot complain if any other person do so, although such person necessarily pass along the route of the ferry established by the legislature, and granted to the company.

A different construction of the act of incorporation would give to the company the exclusive privilege of trading to or from Opelousas river, to any other part of the state, in vessels propelled by steam, without imposing on them the obligation of keeping such vessels in that trade.

The only case in which it is alleged the Dolphin took a passenger from the lower *termini* to the upper, is that of Heighmart, who is stated to have been taken at Placquemine, and got on board at the junction of Placquemine and the Mississippi, about half a mile below the mouth of the bayou, the boat having stopped to put out freight.

In all cases, principally in penal actions, the plaintiff must clearly prove his case, and he cannot hope to succeed if he leaves it doubtful. Here the defendant contends, that the lower *terminus* is the park, or the lower end of bayou Placquemine; that if the place where the Mississippi enters the bayou be the *terminus* then the ferry is from the Mississippi to Opelousas, not from Placquemine to Opelousas. Further, that the testimony leaves it doubtful whether the passengers came in half a mile below the junction, *i. e.*, on the Mississippi, or half a mile below the junction with the bayou. To this it is urged that the testimony is, that the passenger came in at Placquemines, *i. e.*, in the bayou Placquemines.

The spot on which a collection of houses have been erected along the Mississippi, immediately below where it enters the bayou, and in which there is, or was, a post-office, is called Placquemine, and may include the banks of the river for nearly half a mile. We do not think that the evidence is so clear as to justify us from departing from a rule in which we have found much safety, to respect matters of fact, the conclusion of those who had the advantages of seeing and hearing the witnesses.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs, and that the plaintiff, Luke Lesassier, pay the costs in both courts.

Ogden and *Brownson*, for the plaintiffs.

Garland and *Simon*, for the defendant.

Dufau *v.* Massicot's Heirs. VI, N. S. 182.

An insolvent debtor does not acquire a discharge of his debts when the creditors fail to appear; or having made a change of parish, withdraw it.
In a suit to ascertain the share of one partner, all must be made parties.

COURT of Probates Parish of St. Mary's.

PORTER, J., delivered the opinion of the court.

The petitioner claims from the defendants the sum of 5000 dollars balance due on an account settled and signed by the ancestor of the defendants, and the plaintiff on the 20th of September, 1809; 1794 dollars 70 cents, for the third of the losses sustained in a partnership of which they were members in conjunction with one Laurent Wiltz; 2844 dollars 44 cents, the one-half of the petitioner's losses in the partnership, the ancestor of the defendants having purchased the one-half of plaintiff's interest in the concern, previous to its dissolution; and interest on a part of these claims according to an account annexed to the petition. Judgment is asked for 13,545 dollars with interest from judicial demand.

The defendants plead that their ancestor on the 24th of August, 1813, made a cession, under the act for the relief of insolvent debtors in actual custody, of all his property; and was discharged from all debts contracted prior to that day.

That he had no other accounts with the plaintiff excepting those in relation to the plantation of which they were partners, and that their accounts were settled and liquidated by a judgment of the district court of the state of Louisiana for the first district, on the 29th of June 1819, in which, I. P. Wiltz, was plaintiff, and the petitioner, one P. F. Dubourg, and C. Massicot, were defendants.

And lastly, that the plaintiff was indebted to their ancestor at his decease in the sum of 3000 dollars.

The cause was submitted to referees, who reported that the sum of 9655 dollars 64 cents, was due by the defendants, with interest on 5000 dollars of this sum at the rate of ten per cent. from different periods at which the several instalments composing this sum fell due. The defendants appealed.

The first question for our decision is, the effect of the discharge under the insolvent laws.

It appears from the record of the proceedings in the suit of Massicot *v.* His Creditors that some of them alleged fraud against him; that on his filing an answer to the charge, the allegation was with-

drawn, and that the court therefore ordered, he should be discharged out of custody. These proceedings bear date the 4th of December, 1813.

On the 21st of January, 1814, a syndic was appointed, and on the 15th of March of the same year, the insolvent took the oath prescribed by the statute, and executed an assignment of all his property to his creditors.

The plaintiff contends, these proceedings have not the effect which the defendants in their answer allege. That no judgment of the court being rendered discharging the defendant from the debts contracted by him, they yet remain in force and can be collected from him or his representatives.

The fourth section of the act under which the insolvent claimed relief, declares that in case the creditors when notified do not attend on the day appointed for them to appear and answer the claimant's demand for a discharge from the custody of the sheriff, the court shall in its discretion either release the debtor or remand him until another day: and should the creditors not attend on that day and show cause as aforesaid, the debtor *shall be discharged*, on executing an assignment in trust for his creditors; and on taking the oath herein prescribed. 2 *Martin's Digest*, 444.

This section would perhaps sustain the plea of the defendants, but it must be taken and construed with another, that precedes it, and which is as follows: "The creditors being thus duly notified shall have the right to interrogate the debtor, &c., and should the court be satisfied with the fairness and regularity of his books and accounts (if a merchant or a trader) and the documents which accompany them, and that two thirds of his creditors in number and value, will consent to his discharge, he shall on executing an assignment of his estate and effects, to trustees named by his creditors under the direction of the court, and on taking the oath herein prescribed, be forever discharged from all suits and actions then pending against him, and from all manner of debts which he may before that time have contracted."

A clause of the 6th section of the act also requires to be set out, in order to enable us to present clearly the true construction which that relied on by the defendants should receive. After directing the proceedings which should be had in case the creditors make an allegation of fraud, it proceeds to declare, that if the jury find the debtor not guilty of fraud, he shall forthwith *be discharged* from the custody of the sheriff, and from all manner of debts which he may before that time have contracted. 2 *Martin's Digest*, 446.

The two cases then, in which the legislature have declared that the debtor shall be discharged from previous debts are: 1. Where two thirds of the creditors consent: and, 2. Where they make an allegation of fraud, and that allegation is found untrue. But no such consequence is declared to follow the non-attendance of the creditors and their failure to consent, or object; and it cannot be implied. On the contrary, the presumption is, that no such consequence

was contemplated by the law-maker. The section relied on merely states, that if the creditors do not attend the debtor shall be discharged, (*elargi*,) that is, discharged from imprisonment. If the word *discharged* conveyed the idea that the debtor was released from his debts, there was no occasion for the legislature to add after it, in the preceding, and succeeding sections, *and from all manner of debts;* their using these additional terms shows that they did not consider the word *discharged* would have that effect. The change of phraseology, indicates a change of intention, and neither in the reason of the thing, nor in the language used, are we authorised to say that the mere non-attendance of the creditors operated a release of their debts. This view of the subject becomes conclusive when we turn our attention to the French text, which, at the time this statute was passed, was of equal authority with the English. The corresponding term used in it, to *discharge* is *elargi*, which means set at liberty, and does not at all convey the idea, of a release from debts.

It was urged the defendant might come under the protection of the 6th section because the charge of fraud had been made against him by his creditors. But that charge appears to have been made in error, and to have been withdrawn when that error was discovered. It is only trial, and verdict of acquittal, that produces the consequence contended for.

In regard to that portion of the plaintiff's claim which is founded on a balance due for the partnership affairs, we think the objection that the representatives of With should be parties, must prevail. By the decree of the district court where these matters were once liquidated, and which settled as far as was then possible the accounts of the partners, it was declared, that after the debts of the firm should be paid, if any surplus remained it will go to the discharge of the common debts which the several partners may have against the joint concern. By this action it is attempted to establish what is the share of the debts due by one of the members of that firm to it, without all the partners being before the court. This cannot be done, nor is the case of the plaintiff made stronger by showing, that since that time the other partner has been paid all claims he may have had against the firm. For it appears by the terms of the satisfaction entered on record that this amount was settled between the plaintiff and the other partner without the intervention of the ancestor of the defendants, consequently as to the person they represent these matters are still open, and all must be before the court to enable a final settlement to be made.

One of the most important questions in this case is, in relation to the interest due on the private account. By the contract of sale which forms the principal item of this account, the plaintiff sold to Massicot the one half the vendor's interest in the plantation on the same terms, clauses, and conditions, that he had acquired it. And the vendee stipulated that he would stand in his place. One of the clauses of the contract by which the vendor acquired the property

was that, if the payments were not regularly made, the sums due should bear interest at ten per cent. An objection has been taken that, by the contract, the purchaser was to pay other persons than the seller, and that, on his failure to comply with his agreement, and payment by the vendor, that he then owed to the latter, and that the interests ceased to run from that moment. But we are of opinion that though he might have discharged his engagement by paying the price to the person indicated in the act, his failure to do so cannot place him in any better situation than if by the terms of the agreement the payment was to have been made to the seller. The money was still due, and the interest was to run until perfect payment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the probate court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover from the defendants the sum of five thousand dollars with interest at ten per cent., on the four several instalments of twelve hundred and fifty dollars each, from the time they became due; viz: from the 15th of March, 1811, the 15th of March, 1812, the 15th of March 1813, and the 15th of March 1814, with costs in the court below, those of appeal to be paid by the plaintiff: reserving to him the right to assert his claim in relation to the partnership concerns in a suit where the partners or their representatives are parties to the suit.

Brownson, for the plaintiff.

Simon, for the defendants.

Collins *et al. v.* Andrews. VI, N. S. 190.

A contract, by which a tutor agrees to pay interest on a claim due by the minor, on being allowed a longer term of credit, is not void, but voidable.

And if the minor is not injured by it, the contract will not be set aside.

It is the duty of an agent to prove those facts which will discharge him from responsibility in not collecting debts put into his hands for collection.

FIFTH District.

MATHEWS, J., delivered the opinion of the court.

This suit is instituted to compel the defendant to render an account of his management of the succession of Luke Collins, as agent of the

plaintiffs, with the power and privileges of a curator. The accounts by him rendered, with evidence to support them, were submitted to referees, whose report was adopted by the district court as the basis of its judgment, and being in favor of the defendant, the plaintiffs appealed.

Several exceptions were filed against the statement made by the referees, which were overruled by the court below. The objections to the report were founded on matters of fact; and as the facts of the cause do not come up on the record, they can not be regularly noticed by this court.

The case presents two principal questions of law. The first relates to the legal effects of an instrument of compromise and mortgage entered into by the widow on her own account, and that of the heirs of her deceased husband, as their tutrix by nature, with the creditors of the estate. By the provisions of this act, time was allowed for the payment of the debts, and a mortgage taken on the property of the succession to secure their payment, according to the terms agreed on, together with interest and damages which might result from non-performance on the part of the obligors.

The second question arises out of a failure on the part of the defendant to collect a part of the debts due to the succession, resulting from a sale of the property thereof, effected for the purpose of making payment to its creditors.

There is also a subsidiary question as to the right of the creditors to recover interest, after full and final payment to their agent of the principal debts.

Previous to entering into the consideration of these questions, it is proper to give a short history of the case: Luke Collins died owing considerable debts to several persons; at the time of his death, it seems to have been considered that his succession could not have been sold, unless at a price less than its real value; and for this reason, his widow, in her own right as a partner in acquests and gains, and as tutrix of her minor children, entered into the agreement above stated with the creditors of the community. Having failed to meet the payment of the sums therein stipulated, on the terms prescribed, the property of the succession was sold by the consent of all persons concerned therein, widow, heirs and creditors; and the defendant was appointed by the widow and heirs to collect the amount for which the property sold on certain terms of credit, and was also empowered by the creditors to receive and hold the money thus collected in discharge of their claims against said community or succession.

As to the first of these questions proposed, arising out of the act of mortgage made in favor of the creditors by the widow of L. Collins, so far as it affects the rights of her minor children, considered exclusively as a compromise respecting their rights, being entered into without the authority required by law, it was perhaps null and void, *ab initio*. See old Civil Code, p. 70, art. 65, and 10 *Mart.* 726. But a tutor may pay the debts of a succession under his management, and

in rendering an account of the position of his affairs to the heirs, such payments would certainly be properly placed to his credit. In the instance before the court, the tutrix, by agreement, prolonged the time of payment, evidently with the intention of benefitting her minor children by preventing a sacrifice of their father's estate, and her own property as partner in the community.

The act, it is believed, may be viewed as one entered into by the tutrix in relation to the payment of debts, justly owing and due, from the succession of the intestate; thus viewed, it is not absolutely void, but only voidable, on showing injury to the minors.

Now the facts of the case, so far as exhibited by the record, show that no damage occurred to the estate of the minors, in consequence of the postponement of the payment of the debts due from the inheritance. Time was obtained on condition of paying legal interest, on failure of payment at the periods stipulated in the contract; opposed to such interest, was the probable profits of the estate, until it was sold, which may fully be presumed to have equalled the rate of interest payable on the debts. *Febrero*, p. 2, *lib.* 2, *cap.* 3, *s.* 2, *nos.* 61, 62 and 63.

In relation to the rights of the creditors to recover interest, the principal being satisfied, it suffices to observe, that the whole amount, both principal and interest, of their claims having been paid into the hands of their agents; if the interest were legally due at the time the money was thus received it was imputable to the payment of interest, which was consequently paid simultaneously with the principal.

The second question is in relation to a bill of exceptions taken to the opinion of the judge *a quo*, by which he required the plaintiffs to prove negligence on the part of the defendant in not recovering two debts, amounting to 880 dollars, due to the succession of L. Collins. The authorities on this subject have the appearance of variance; but we are inclined to think the court below erred in throwing the burthen of proof on the plaintiffs. It is, in our opinion, incumbent on the defendant to show the occurrences which prevented him from collecting the sum of 740 dollars from Ligot, and 140 dollars from Moore; or, in other words, to show due diligence. See 11 *Martin*, 190 *et seq.*

As the defendant may have been prevented by this erroneous opinion from proving his diligence in endeavoring to collect these sums, it is proper to send the cause back for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the case be remanded for a new trial, with instructions to the court below to require the defendant to prove diligence; and the appellant pay costs of appeal.

Todd and *Simon*, for the plaintiffs.

Brownson and *Bowen*, for the defendant.

Doucet *v.* Broussard *et al.* VI, N. S. 196.

It is not essential that a parish judge should state in an act that he is *ex officio* notary public.

In a donation to one of the spouses in a contract of marriage, the posterity of the donee, not proceeding from the marriage, can not take.

That person is to take as heir, who is such at the opening of the succession.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This case presents no questions of fact; those of law which arise on it, grow out of the clauses contained in an act passed between the father of the plaintiff, and his step-mother Francoise Martin, both of whom are now deceased.

Previous to their marriage, they made, by public act, an agreement, in which it is stated, "that Francoise Martin, out of good love and affection to Jean Pierre Doucet, inhabitant of the Parish of St. Landry, acknowledges and declares, by these presents, to make a full and entire donation of the whole of her property movable and immovable, unto the said Jean Pierre Doucet, to hold the said property, and every part thereof, after her decease, to his only proper use and behoof. However, in case the said Jean Pierre Doucet should depart this life before the donor, she acknowledges and declares, by these presents, and it is her wish and intention, that this donation should have its full force and effect in favor of Pierre Doucet, the son of the aforesaid Jean Pierre Doucet."

After making some exceptions in favor of her heirs, and of one Ursin Broussard, who is also a party to this suit, the act proceeds to state, "the conditions of this donation are such, that whereas, the said Francoise Martin is about entering into the bonds of marriage—now, if by this marriage she should have any children, then the present donation, and every thing therein contained, shall be null and void, for her intention is not to deprive her children of her inheritance, or any part thereof."

The marriage contemplated at the time the act was entered into took place, and terminated by the death of the husband, Jean Pierre Doucet, without any children having proceeded from it. Sometime after its dissolution, Francoise Martin intermarried with one Joseph Savois, and the marriage was dissolved by her death. Previous to her decease, she made a disposition of her property by last will and testament, in which she gave to her husband the use and enjoyment of her estate during his life, and, at his decease, directed, that after

certain legacies were satisfied, which need not be stated in detail, the rest of her property should go to such of her heirs as were capable of inheriting from her.

At her decease she left a sister, who was married to one Francois Breaud; by their marriage contract it was provided, that in case he survived her, he should be entitled to the whole of her estate; this sister died previous to the death of Savois, the husband.

The parties before the court are, first, the plaintiff, Doucet, who, in virtue of the stipulations entered into by the marriage contract with his father, claims the whole of the estate: the executor and legatees of the will, who insist on its validity, and contend that the donation to the plaintiff was null and void: and lastly, Francois Breaud, and the more remote collateral relations of the testatrix, who contest the right to the residuary portions given by the will to her legal heirs. Breaud's claim is in the right of his wife, who, he avers, was the nearest relation at the time the succession was opened. His adversaries reply, that it was not the nearest relation at the time of the testatrix's decease the property was bequeathed to, but the most capable of inheriting at the death of Savois; and that the sister having died without issue before him the property belongs to them.

The first question for our decision is presented by a bill of exceptions. The plaintiff on the trial, offered in support of his claim, the act which has been already set out, and its reception in evidence was objected to, because it purported to be made before the parish judge, without any statement in the instrument that he was *ex officio* notary public. The judge of the first instance overruled this objection, and, we are of opinion, correctly. It is one of the most technical kind, relying for support on the letter that killeth, rather than the spirit that giveth life; and it can not be sustained even by the principles on which it was advocated. The law having expressly made the parish judge *ex officio* notary public, the latter appellation makes no part of his style of office. It is attached to, and follows that of judge, when acting in a notarial capacity, and consequently, there was no necessity for setting it out in the act.

The second, and by far the most important question in the cause, arises out of the instrument passed between the father of the plaintiff, and Francoise Martin. The validity of the donation thus made, depends on the true and proper construction which several textual provisions of our law should receive.

The 211th article of the old Code, under which the agreement was made, provides, that "fathers and mothers, the other ascendants, the collateral relations of either of the spouses, and even strangers, may give the whole, or a part of the property, they shall leave on the day of their decease, both for the benefit of said spouses, and for that of the children to be born of their marriage, in case the donor survives the spouse donee."

"Such a donation, though made for the benefit of the spouses, or of one of them, is always in the aforesaid case of the survivorship of

of the donor, presumed to be made for the benefit of the children or descendants, to proceed from that marriage."

The 217th article of the same work declares, that "donation made to one of the spouses on the terms of the articles 214 and 213, fall, if the donor survives the donee, and his or her posterity.

These articles are taken verbatim from the 1082d and 1089th articles of the Napoleon Code, and a good deal of research has been exhibited to show what construction these provisions have received in the country from which we received them. The weight of authority appears to us decidedly in favor of the ground assumed by the defendants. There are some writers, it is true, who think differently; but on the other side are found the greater number, among them, those names which have rendered the modern jurisprudence of France, familiar to foreign nations. *Paillette* on the 1089th art. of *Nap. Code*; *Merlin Rep, de juris. verbo, Institution Contractuelle, sect.* 12, *no*, 9; *Toullier, vol.* 5, *lib.* 3, *tit.* 2, *cap.* 8, *no.* 842; *Grenier, vol.* 2, 29.

It is true as has been urged by the counsel for the plaintiff, that the expressions in the 217th article, his or her posterity authorise an interpretation, which would enable the children of the donee to take, although they might not proceed from the marriage; and it is true, there is no such provision in the Napoleon Code, as that found in ours, that when the law is clear and free from all ambiguity, the letter must not be disregarded, on pretence of pursuing its spirit. But it is precisely because we feel that it is not clear and free from all ambiguity, that we are obliged to look beyond the mere literal import of the terms used in it. If each article of our Code was construed singly, without reference to others which treat of the same subject, we would have the legislature, in many cases, doing what they are never presumed to do, that is, enacting contrary provisions on the same subject matter.

The two articles of our Code already cited when brought in juxtaposition, satisfy us that the jurists of France have wisely interpreted them. The first declares, that donations of this kind are always presumed to be made for the benefit of the children of the marriage. This declaration is wholly irreconcileable with the idea, that on failure of children of the marriage, they are to benefit the children of the donee by a former one. Such construction would make the 211th article of no force. But by limiting the word posterity to the offspring of the marriage, both are left with effect; the 217th, it is true, somewhat restricted, but this is preferable to making a dead letter of the other.

This view of the subject disposes of the question raised by the express gift made to the plaintiff, considering him as a stranger, and incapable of being benefitted by the contract entered into, in relation to the marriage; then the donation can be considered in no other light but as one *mortis causa*, and it wants the formalities necessary to give it effect as such. One of the principal reasons given by the jurists of France for construing the word posterity in a restricted

sense is, that the donor could not give to the children of a former marriage by name, and that it would be permitting that to be done indirectly, which could not be done directly, to allow them to take as children of the donee. See *Paillette; Merlin, loco citato.*

As to the question raised between Breaux, representing the rights of his deceased wife, and the more distant collateral relations, it has not created the slightest difficulty in our minds: it is most clearly the nearest heir at the time of opening the succession that the bequest is made to, not those who should become so after the death of her husband.

It is, therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Brownson, for the plaintiff.

Simon, Bowen and *Markham*, for the defendants.

Landry *v.* Broussard. VI, N. S. 204.

An instance of an appeal upon an improper exception to interrogatories.

FIFTH District.

Porter, J., delivered the opinion of the court.

The defendant, sued for the payment of the price of a tract of land, pleaded, that the plaintiff and he had subsequently agreed to rescind the sale, and he annexed interrogatories to the answer, by which the plaintiff was called on to state, whether or not such an agreement had been made.

The plaintiff excepted to these interrogatories because it was no where alleged in them, or in the answer of the defendant, that the property had been delivered, and that without delivery, no such interrogatories could be put in relation to immovable property. Civil Code, *no.* 2255.

If the case was before us in such a shape, that the question here raised could be gone into, the exceptions would perhaps be found to have been prematurely taken. They would rather seem to belong to observations on the evidence, than be an objection to the plaintiff's answering; for *non constat* that the defendant might not have proved the delivery by other testimony. If he failed to offer that proof, or if it could not be received by a want of proper allegations in the answer, the exceptions would belong to another stage of the cause.

But we express no decided opinion on this point, for the case is not such a one as we can take cognisance of at present. It is not every erroneous decision of the inferior courts that will authorise an appeal to this. The judgment or order must be such as may work an irreparable grievance, or in other words it must be one that cannot be remedied after final judgment. Admitting therefore that being compelled to tell the truth is a great grievance to the plaintiff, we cannot consider it an irreparable one. Any injury he may sustain from it can be corrected after the case is finally disposed of below.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed, with costs.

Simon, for the plaintiff.

Bowen, for the defendant.

Rawle *v.* Fennessey. VI, N. S. 204.

FIFTH District.

Decided, totidem verbis, that a party to a public act, who has not a counter.letter, cannot be permitted to prove that it was feigned and simulated.

Labolais *v.* Bernard. VI, N. S. 206.

A party who has agreed to pay damages for a trespass on the plaintiff's land, cannot allege his error as to the title of the plaintiff without proving it.

FIFTH District.

Mathews, J., delivered the opinion of the court.

This action is founded on a written promise of the defendant to

pay to the plaintiff the sum of 305 dollars; judgment was rendered in favor of the latter in the district court, from which the former appealed.

The promise, as it appears from the evidence of the case, was made in consequence of a transaction which took place between the parties to the suit, relative to timber which the defendant had taken from the land of the plaintiff. The defence set up against the right of recovery, is error in the transaction or compromise. The appellant alleges that the land from which he took the timber is not the property of the appellee. He certainly recognised it as belonging to the latter by the compromise, and we are unable to discover any evidence on the record which shows that this recognition was made in error.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Brownson, for the plaintiff.

Markham and *Simon*, for the defendant.

Coleman *et al.* v. Breaud. VI, N. S. 207.

A copy from a register's office in another state, does not dispense with the production of the original deed.

When the record does not show the law that regulates contracts entered into abroad, the court tests them by the laws of this state.

FIFTH District.

MATHEWS, J., delivered the opinion of the court.

The record in the present case contains a history of the proceedings in two suits which were consolidated and in that shape tried in the court below; one commenced by Coleman and Nelson, claiming to recover from the defendant certain slaves, to which they alleged title in themselves, supported by a deed of trust from one Barfield; the other brought by said Barfield, in which he claims the property as belonging to him. There was judgment in the district court for the defendant and the plaintiffs appealed.

The first evidence offered in support of the claim of the trustees is a certified copy of the deed on which they rely, taken from a recording officer in the state of Tennessee. The introduction of this piece of evidence was opposed by the counsel for the defendant, on two

grounds, 1. As not having been certified according to the provisions of the act of Congress made for such cases: 2. Because the original deed was not accounted for. The opposition was sustained by the court below, and a bill of exceptions was taken on the part of the plaintiffs. We are of opinion the judge *a quo* acted correctly in rejecting the evidence in the shape in which it was offered: the original deed should have been produced or its loss, or some other circumstance proved, showing it out of the power of the appellants.

Many attempts were made to obtain the testimony of witnesses by depositions, to support the claim of the plaintiffs; all these were rejected by the district court as having been illegally taken; we have examined the bills of exception, which relate to the opinions of the judge *a quo*, by which he rejected the testimony, and believe that they are correct in every instance.

The claim of the trustees is wholly unsupported by evidence, and must therefore be dismissed without comment. The only testimony found on the record in support of Barfield's title to the slaves in dispute is that of two witnesses, Meltz and Hudgens. They prove that the plaintiff held the negroes in possession in the territory of Arkansas, and delivered them to one Haralson, under whom the defendant claims title, to be brought to the state of Louisiana, and hired out for the benefit of the pretended owner. The jury to whom the case was submitted seem by their verdict to have discredited this story about the hiring; and if the case were to be governed by laws which authorise the transfer of slaves by parol, in pursuance of this verdict, the title might be presumed to have accompanied the tradition to Haralson, which he has regularly passed to the defendant.

But as there is no evidence in the case which shows that it must be governed by foreign laws and the provisions of those laws on the subject, it is properly to be subjected to the influence of the laws of Louisiana: and according to the principles therein contained, possession is not evidence of title to slaves, for they must be transferred by written evidence of title. It is true, that there may be exceptions to the rule established by our laws, *e. g.*, in relation to the offspring of female slaves born while in the possession of the masters.

In the present case the plaintiff Barfield, does not bring himself within any exceptions to the rule, and consequently, has shown no title to the property claimed in his petition.

The whole circumstances of the case so far as disclosed by the record, do not in our opinion call for the interference of this court, to reverse the judgment of the district court and to enter one of nonsuit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Baker, for the plaintiff.

Simon and *Brownson*, for the defendant.

Miles *v.* Oden *et al.* VI, N. S. 211.

FIFTH District.

If the plaintiff proced to final judgment without the defendant having answered, and without having taken judgment by default, the final judgment will be set aside, as the *contestatio litis* was not formed by the pleadings.

Rizat *et al.* *v.* Ponsony. VI, N. S. 212.

FIFTH District.

The district court is without jurisdiction in a suit to compel a tutor, whose office is expired, to account and pay the balance in his hands.

M'Donough *v.* Rogers. VI, N. S. 212.

FIFTH District.

No appeal lies from an order directing plaintiff to answer interrogatories. The delay that the plaintiff feared, and alleges for injury, is only increased by the appeal. If the answer be wrongly exacted, that may be made appear after it is put in, as well as here on appeal.

Latiolais v. Richard. VI, N. S. 213.

The bare circumstance of location can give no additional force to a claim in opposition to another originally stronger by its age and locality.

The operations of surveyors cannot derogate from claims to land recognised by the proper officers of the United States.

FIFTH District.

MATHEWS, J., delivered the opinion of the court.

The present case presents a dispute concerning four arpents of land fronting on the bayou Vermillion, with the ordinary depth of forty, situated in a place called the Mauvaise Prairie. The plaintiff obtained judgment in the court below, from which the defendant appealed.

The evidences of the titles adduced on the part of the former, show that he had acquired a right to eighteen arpents front on the bayou above stated, with the ordinary depth. The defendant shows a title to twenty arpents front, &c. on the said bayou.

Surveys of the claims of both parties are exhibited, purporting to have been made by a surveyor of the United States, in pursuance of certificates of confirmation issued by the land commissioners, and under orders of the principal deputy surveyor for the western district of the state of Louisiana, &c. Some time after the return of the survey made for the plaintiff, to the office of the principal deputy surveyor, and subsequent to his approval of the same, he (the plaintiff) disapproved of the manner in which his land had been located, as not being in conformity with his original titles.—These titles are supported by two *requetes* and orders of survey, one in favor of a person named Zerringue, and the other of Provost, who acquired the right of the former and transferred both it and his own to the appellee.—The title or rather claim of Zerringue, calls for the land of Fusillier, above on the bayou, and vacant or unappropriated land below. The *requete* of Provost requires as limits of the land petitioned for, the boundary of one Carrier below, and that of Zerringue above. The surveys of these claims were made for the benefit of the plaintiff under the inspection and instructions of his agent Francois Carmouche, (who figures as a principal witness in the cause,) and were executed in such a manner as to unite them by limiting the lower on the line of Carrier, and running up the bayou for the quantity of eighteen arpents, the whole amount required to fill their measure. Thus executed, the extent of both the surveys (as it

appears by the evidence of the cause) did not reach the limit of Fusillier's land, nor did that made under Zerringue's claim, include a field which he had cultivated, although it seems to have included the site of his building at no great distance from the centre of the eight arpents as surveyed. Some time after the plats of survey, made in the manner and under the circumstances above stated, the defendant caused his claim to be located adjoining the upper limit of the plaintiff's land. These are the most important facts, necessary to be noticed in the decision of the cause; and from which a sole question arises, whether the plaintiff can legally be permitted so to alter the location of his claims in such a manner as to recover from the defendant the land in dispute.

According to the whole evidence of the case no doubt can be entertained of the preference to which Zerringue's claim was entitled over that of the defendant, in its location, and that consequently the plaintiff who is now the proprietor thereof, might have caused it to be placed in such a manner as to have embraced the land claimed in the present suit.

It is believed that the alteration required by him ought to be permitted unless it has a direct tendency to invade the rights of the defendant legally acquired and vested. We must therefore inquire into the title set up in his defence. This is similar to that of the plaintiff, except that it is a later date and did not call for the place in which it has been located. The bare construction of its location can give it no new or additional force in opposition to a claim stronger originally by its greater age and definite locality. The operations of the surveyors ought not to be allowed to add to or derogate from rights and claims of individuals, to land as recognised by the proper officers of the government of the United States. The order of the principal deputy surveyor, in pursuance of which the claim of the defendant seems to have been located, cannot impair the right of the plaintiff. The surveys made and returned by Johnston, the deputy surveyor, apparently executed under the directions of an agent authorised by the appellee and acquiesced in by the latter for some time, may be considered as having been made in error, and ignorance of facts, which would have justified him in requiring a different location of the claim derived from Zerringue, and such as he now insists on.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Brownson, for the plaintiff.

Simon and *Markham*, for the defendants.

Perry *v.* Frilot. VI, N. S. 217.

The promise of a father to pay part of the debt of his insolvent son, to a creditor, (who alleges fraud in the insolvent, and threatens a prosecution, and promises to procure a discharge from the creditors, on being secured) is without a good consideration and void.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This case presents a single question, but it is one which has arisen for the first time in this state, and it is of considerable importance.

The son of the defendant was indebted to the plaintiff and became insolvent. After the filing of his bilan, or immediately previous thereto, the plaintiff called on his father and told him that his son had acted fraudulently in his failure, and that unless he, the father, would pay a proportion of the debt due the plaintiff, he would prosecute the son criminally; but if the defendant would comply with the demand, the plaintiff would obtain a discharge from the other creditors, and give his own.

It appears clearly, from the evidence, that the defendant, influenced by these menaces, and moved by parental affection, gave his three several notes to the plaintiff, payable at different times, for 800 dollars each; that these notes were afterwards surrendered and in lieu of them, the three obligations, given, on which this suit is brought.

The defendant sets up, as a defence to the payment, the illegality of the consideration; he asserts the notes to be null and void.

The evidence does not show whether the conduct of the son was fraudulent or not. But the want of proof on this head cannot affect the conclusion to which our duty requires us to come. If it was not fraudulent, the plaintiff practised a gross fraud and deception on the defendant. If it was fraudulent, he cannot make the promise to conceal that fraud the basis of an action in a court of justice. The consideration was immoral, and society cannot lend its aid to enforce obligations entered into in contravention of those regulations which have for their object the enforcement of a great purpose of public policy. The rules established by the legislature in relation to insolvent debtors are intimately connected with private faith; public morals; the maintenance and extension of that commerce which must rest, in a great measure, on credit; and that confidence which man can repose in his fellow man. Their end is twofold, to protect and relieve the unfortunate, and to punish the fraudulent. The considera-

tion held out by the defendant to the plaintiff for these notes, was a promise to defeat the latter purpose. Not only did he engage to be inactive and remain silent where his duty as a citizen required him to speak out, but he promised he would get the other creditors to sign; that is, that he would deceive them, and deceive his country too, which punishes with infamy, and the pains and penalties attached to perjury, the debtor who acts fraudulently in making a surrender of his effects. The defendant's counsel has read from English and American reports to show that, in cases like this, courts of justice have refused to enforce obligations made in contravention of the policy of their bankrupt laws. They go the whole length for which the appellant contends. But we do not rest our judgment on them. The principles which repel the action are in our own law. They make a part of the very elements of which society is formed. An obligation with an unlawful cause, says our Code, can have no effect. The cause, says the same work, is illicit when it is forbidden by law, when it is contrary to *bonos mores*, or to public order. That the cause or the obligation on which this suit was brought was such, not a doubt exists in our minds. Civil Code, 264, arts. 31 and 33; Acts of the Leg. 1817, 136, 21; 3 Caines, 212; 3 Durnford & East, 17; 9 Johns. Rep. 295; 12 *Ibid.* 306; 2 Durnford & East, 763.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Brownson, for the plaintiff.

Baker, for the defendant.

Police Jury of the Parish of Lafayette v. Reeves.
VI, N. S. 221.

If land be given, on condition that the public buildings be erected thereon, it reverts to the donor, on the seat of justice of the parish being moved to another spot.

But the police jury may remove the buildings they erected thereon.

FIFTH District.

PORTER, J., delivered the opinion of the court.

In this case, the persons under whom the defendant claims, made, *sous seing privé*, a proposition to the Parish of La Fayette that, if the

commissioners of the Parish "should come to the decision of fixing the courthouse some where near the Vermillion Bridge, upon the land of the donors, they would each make a donation of two superficial arpents of land." The commissioners accepted the offer, and the donation was made by public act, on the conditions stated in the instrument under private signature. The erection of the public buildings was commenced by placing a jail on the property given.

By an act of the legislature passed subsequent to this contract, the right of fixing the seat of justice was vested in the inhabitants of the Parish, to be decided by the majority of votes. Their decision was that it should be removed from the place fixed on by the commissioners.

The petition sets out the plaintiffs' case at great length; states that their title to the property is complete, by the act of donation; avers that the defendant has taken forcible and illegal possession of the premises; prays that they may be quieted in their title, and that if their title be not good, they may be at liberty to remove the jail.

The answer of the defendant sets up various objections to the plaintiffs' right of recovery, asserts a title to the property claimed, and states, that the donation being made on the condition that the seat of justice should be fixed on the land of the donors, the removal to another place rendered the donation void and of no effect.

The judge who heard the cause was of opinion and so decreed, "that the plaintiffs should be quieted in their title and possession, of the lot of ground claimed by them and the edifices erected thereon—that the defendant be enjoined from interfering in the full enjoyment of the same or the removal of the public prison, and that the defendant pay costs; without prejudice, however, to any claim of the defendant to recover back the lot according to the conditions of the donation, if the police jury should remove the prison from the same."

We are of opinion this decree is erroneous. The case is one of the utmost simplicity.

The donation being made on the condition that the courthouse should be placed on the land given, the removal of the seat of justice to another place, dissolved the contract, and gave a right to the donors, or their assignee, to take back the property given. Civil Code, 274, art. 83.

But the buildings being placed there in good faith, the Parish had a right, either to have the materials, or the price, as the defendant may choose. Civil Code, 104, art. 12.

The decree, reserving to the defendant, the right to annul the contract by suit, in case the jury should remove the jail, is founded on two errors, one of fact, and one of law.

Of fact, in supposing the placing of the jail there to have been the condition of the gift, whereas, by the terms of the contract, it was the courthouse that was to be fixed on the land given. If the words of the donation had even been public buildings, we should have come to the same conclusion, for it is not to be supposed that any man in

his senses would make a donation for the purpose of having a jail placed at his door, though he might well be presumed willing to give a part of his land that the rest might increase in value, by having the seat of justice fixed at it, and the town erected thereon, which would necessarily grow around the place where all the inhabitants of the parish were so often compelled to assemble.

Of law, in deciding, that in case the plaintiffs should put in execution the decree rendered in their favor, the defendant should have a right of action against them. Such circuity of proceeding is unknown to our jurisprudence. If the execution of the judgment conferred a right of action, it furnished the best possible reason why it should not have been rendered. It is true our Code declares that the dissolving condition which is always understood in synallagmatic agreements in case of either party failing to comply with his engagement, does not dissolve the contract of right—that the dissolution must be sued for at law. But where, from the situation of the parties before the court, the plaintiff seeks to do something contrary to his agreement, the defendant may well offer that agreement as a defence; though, if the former had done it without the aid of the law, the latter might have been obliged to sue for a dissolution of the contract. It is doing a vain thing for a tribunal to give a decree, which, by its very language, is to be the foundation of another suit. It is sowing the seeds of litigation instead of cutting it down.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the donations to the plaintiffs of the property mentioned in the petition, be annulled and avoided, and that the defendant be quieted in his title to and possession of the same; and it is further ordered and decreed, that, unless the defendant, within sixty days from the rendition of this decree, pay to the plaintiffs the value of the materials of the buildings erected by them on his land, they have liberty to enter thereon and remove the same. It is further ordered, adjudged and decreed, that the defendant pay costs in the court of the first instance, and the plaintiffs those of appeal.

Simon and *Bowen*, for the plaintiffs.

Brownson and *Davis*, for the defendant.

Judice's Heirs *v.* Brent. VI, N. S. 226.

FIFTH District.

A case of facts. The only point of law decided therein is, that the plea of the general issue is waived by that of payment.

Erwin *v.* Fenwick. VI, N. S. 229.

Damages cannot be claimed, on a contract to deliver slaves, till the party is in *delay*, although the day of delivery be fixed by the contract.

The putting the debtor *in delay* is a condition precedent to recovery, and need not be pleaded in defence.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This action is brought on an agreement entered into in writing, between the plaintiff and defendant, by which the latter promised and obliged himself to deliver at the principal plantation of the former, in the parish of Iberville, twenty slaves, ten of whom were to be males, and ten females, for the sum of 10,000 dollars, payable in notes of the plaintiff, at one and two years.

The petition charges, that the defendant has failed to comply with his agreement; avers that the petitioner was ever ready and willing to perform his part of it; and states the damages at 9,000 dollars.

The answer sets up several grounds of defence, which do not require to be set forth particularly. The issues joined between the parties were submitted to a jury who found a verdict in favor of the plaintiff for 500 dollars. The defendant appealed.

It has been contended in this court, as it was in that of the first instance, that no damages were due to the plaintiff for the breach of the agreement until the defendant was in default (*en demeure*) by a judicial interpellation, or some act equivalent thereto; that this is an

indispensable act on the part of the obligee of a contract for the delivery of a specific thing, before any claim can be made for non-performance; and that until it is done, the obligor has the legal right to discharge his contract by a specific performance, though the time should have elapsed within which it was to be discharged.

With the exception of the case of Bryant *v.* Cox, which went off on another ground, this is the first time in our experience that such a defence has been offered, though the cases in which it might have been made frequently presented themselves. It is one which cannot but be felt to have but little relation to the merits of the case, and not likely to promote its equity. Yet so clear and positive is our legislation on this subject, that we have been compelled, though slowly and reluctantly, to come to the conclusion that it must prevail. 3 *N. S.* 574.

The doctrine on which it rests, like most of the others in our jurisprudence, had its origin in the Roman law. In that system, however, it was limited in such a manner as to meet, in general, the intentions of the parties, and was entirely conformable to reason and common sense. It was confined to those cases, where, by the terms of the contract, no particular time was fixed for the performance, and the necessity of calling on the obligor before there was, in the eye of the law, a breach of his agreement, arose from the consideration that it was presumable it was to be discharged at the demand of the obligee, and not before. From Rome, this principle was carried into France where it was extended to all agreements, whether a certain period was fixed for discharging them or not. The utility and wisdom of such regulations are certainly not obvious to this court. But, considerations of this kind belong to that branch of the government which makes laws, nor that which expounds them. Our legislature have adopted, in its entire extent, the rules which are established in France, and we have no alternative but to enforce them. *Toullier, vol* 6, *lib.*3, *cap.* 3, *no.* 241.

This contract took place under the dominion of the old Code. The 46th article of that work, page 268, declares, that "damages are due only when the debtor has delayed (*est en demeure*) to fulfil his obligation; except, however, when the thing which the debtor had obliged himself to give, or do, could have been given, or done, only at a certain time, which he has suffered to elapse."

This article, if it stood alone, would certainly leave it open for construction to say when the debtor was in delay in not performing his contract; and the most obvious interpretation would be, that he was so when the contract had prescribed a fixed period for performance, and that period was suffered to elapse without the obligation being fulfilled.

But the law-maker has been careful to exclude any such meaning being attached to these expressions, for in another article it is stated, that "the debtor is considered as having delayed (*constitue en demeure*) the delivery, after he has been required to deliver, either by

summons, or by any equivalent act, or by the effect of the agreement, when it is stipulated, that without the necessity of any act but by the mere expiration of the time fixed, the debtor shall be in default." Civil Code, 266, art. 39.

If, therefore, damages are only due from the time the debtor is placed in default (*en demeure*), and he be not in default until summoned or called on to perform by some equivalent act, the conclusion is irresistible, that in a case such as this, where he has not been so placed, no damages can be recovered.

The laws of Spain put the debtor *en mora* from the day the agreement was to be fulfilled, without requiring any act on the part of the creditor. It occurred to us that these provisions might come within a rule we have often applied to the construction of our Code, that subsequent laws do not repeal former ones by containing different provisions on the same matter; that they must be contrary; that the re-enacting general provisions existing in our former laws, and inserting them in our Code did not repeal the exceptions which attended these provisions in the system from which they are taken. *Curia Phillipica, lib. 2, cap. 7, verbo Page, no. 7.*

But this rule can not benefit the plaintiff in the instance before us, for the mode pointed out by which the debtor is placed in default, is not only different, but contrary, to that prescribed by the laws of Spain. By the provisions in the Code, he is in delay by summons or some equivalent act; or by the effect of the agreement, when it is stipulated that the mere expiration of the term shall put him in default. By the former law, the expiration of the term without any act on the part of the creditor, or any express stipulation in the agreement, put the debtor *en mora*. Something further is, therefore, now required to be done, and when one law requires no act on the part of the creditor to confer a right, and a subsequent one does, the latter is so far contrary to the former, that a compliance with it is indispensable, otherwise, it would be without any effect whatever.

It now remains for us to consider, and dispose of the objections, which have been made to the exercise of this defence in the case before us.

1. It has been contended, that the defendant can not take advantage of this failure on the part of the plaintiff, on the issues joined that it should have been specially pleaded.

But the putting the debtor *en demeure* is an act which must precede the recovery. Damages, says the article already cited from the Code, are only due after the debtor is in default. It was not, therefore, for the defendant to show he did not owe. It was the duty of the creditor to allege, or at all events to prove, these facts, without which, he had no cause of action.

2. It has been urged, that, by the terms of the agreement, the parties bound themselves to pay all damages that either might sustain, by a failure of the other to comply with his contract. But here again, the defendant is met by the express provisions of the law,

which only waives the necessity of summons, or other equivalent act, when there is a stipulation that by the mere expiration of the term, the debtor shall be in default.

The judge who tried the cause in the court of the first instance, was of opinion, and so charged the jury, that, there being a time and place fixed by the contract for its performance, the defendant was in default without any act on the part of the creditor. This position is as untenable as those we have just noticed. It is true there may be contracts in which the performance, at a particular time, is so important to the creditor, and enters so much into the consideration, that a failure on the particular day fixed for its discharge, will place the debtor in default; and there may be others where performance after the day would be impossible, of which an example may be given, in an agreement to ship goods by a vessel before she sailed, and others of a similar nature. The writers who treat of this matter, properly consider questions of this kind, as of fact, rather than of law. *Cum sit magis facti, quam juris.* In the case before us, we see nothing which would authorise us to say, that the particular day was so essential to the contract that the mere expiration of the term placed the debtor in default. The place being fixed for performance offers no reason to take it out of the general rule. If the interpretation given by the court below were correct, it would follow, that in every case where a particular time was fixed for performance, the debtor would be *en demeure;* but the provision in our Code, already referred to, prohibits such a construction, by declaring, that the expiration of the term shall not put the debtor in default, unless the agreement contains a stipulation to that effect. Code, 269, 39; *Paillette* on art. 1146 of *Nap. Code; Pothier on Ob.* 162, 146; *Toullier, Droit Civil Francais, vol.* 6, *lib.* 3, *cap.* 3, *no.* 250.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of nonsuit, with costs in both courts.

Bowen, for the plaintiff.

Simon, Brownson and *Baker*, for the defendants.

Abat *v.* Segura. VI, N. S. 237.

FIFTH District.

The issue *fraud vel non* is peculiarly of the cognisance of the jury.

Ponsony *v.* Debaillon *et al.* VI, N. S. 238.

In a suit on attachment bond, the plaintiff cannot give evidence of the deterioration of the property, without having alleged it.

The declarations of a party when they make a part of the *res gesta*, are evidence.

When suit is brought on an attachment bond, it is the duty of the obligee to allege and prove the damage he has sustained by a breach of the condition.

When the plaintiff claims damages beyond the penalty in the bond, and alleges the attachment was commenced with a view to harass and oppress him, the defendant may give in evidence acts of the plaintiff which induced a belief he was about to remove the property. And in every case the obligee in the bond may prove these facts, which produced the belief that the defendant in attachment was about to leave the state.

What others said at the time, of his intention to remove, may be given in evidence.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This action is brought on a bond given by the defendants, to the petitioner on their suing out a writ of attachment against him. The case was dismissed, it not being one, of which the court before whom it was brought, had jurisdiction. The petition sets out the bond and the condition, and assigns several breaches or causes of damage, by which, it is averred, the plaintiff has sustained injury to the amount of 2500 dollars, the sum for which the obligation was given.

After setting out these breaches the petition goes on to state, as another breach of the condition of the bond, "that the writ of attachment, aforesaid, issued out in manner and form aforesaid, by the

said Jean Marie Debaillon, as aforesaid, was illegally and wrongfully sued out, with the intention of harassing, oppressing and injuring your petitioner; by reason of all which premises alleged, the petitioner has sustained damage to the amount of 5000 dollars; that by reason of the breaches aforesaid, alleged, and others that will be alleged, if required by the court, the said writing, obligatory, has become forfeited, and thereby an action has accrued to your petitioner, to demand and have from the said Jean Marie Debaillon and Charles Garrigues Flaujac, Jr. his security, the said sum of 2500 dollars, the amount of said writing obligatory, and to have and demand from the said Jean Marie Debaillon, the aforesaid sum of 5000 dollars."

The petition avers further, that the defendants, though often requested, had refused to pay the amount of the bond so forfeited; and that Debaillon had refused to pay the 5000 dollars damage though often required so to do. It concludes with a prayer for judgment against them both, as parties to the writing, and against one of them, Debaillon, for the sum of 5000 dollars damages.

To this petition, the defendants pleaded the general issue, and further averred, that the court where the suit had been instituted, did possess jurisdiction of the case, that the plaintiff's attorney had admitted it in his answer, and that if it did not, the error was common to all the parties in the suit. That the plaintiff was intending to defraud minors to whom he had been tutor, and the suit had been instituted, against him by attachment, to defeat that purpose.

On these issues the parties went to trial in the court below, and a jury gave a verdict for the plaintiff in the sum of 1000 dollars. A motion was made for a new trial, and overruled; and judgment being rendered in conformity, the defendants appealed.

There are ten bills of exceptions on the record; the first three were taken by the plaintiff, and an attentive consideration of them has satisfied us the judge below did not err in the opinions to which these exceptions are taken.

From the first bill of exceptions taken on the part of the defendants, it appears, the plaintiff offered in evidence, witnesses for the purpose of proving the situation of the real property and buildings at their seizure (under the writ of attachment) and their situation at the time they were restored to the plaintiffs, to which evidence, the defendants, by their counsel, objected, on the ground that no damages had been claimed in the petition for any negligence or misconduct with regard to the real property and buildings whilst under seizure, nor for any deterioration of such property." The court, however, was of opinion the evidence was admissible.

In support of this opinon, it has been first contended, that the plaintiff was not under any necessity of setting out the breaches; that the matter should have come by way of defence from the defendants. A reference to the terms of the bond, and a slight consideration of the nature of the case, completely answers this idea. The bond being for the payment of such damages, as the obligee may sustain, and

the penal sum mentioned in it being merely to cover and secure these damages, it necessarily follows, the plaintiff must allege and prove what injury he has suffered. There is no other mode in which the investigation into the right could be carried on without violating first principles. Let us suppose the case, where a breach of the bond occasioned no injury to the plaintiff. The defendant could not be required to prove that no damage had been sustained, for that would be to prove a negative. In the other hypothesis, that damages had been suffered; it is surely not the duty of the person who inflicts them to allege and prove their nature and amount. By the common law of England, at one period of their jurisprudence, it was a consequence of its technicalities, that, in bonds of this kind, the obligee could, at law, recover the amount of the penalty, and the obligor was driven into equity for relief. But by a statute passed in that country in the reign of William III, the plaintiff was obliged to assign breaches, and prove them. In our system no such rules have ever had existence, and if they ever had, good sense would have long since exploded them.

The plaintiff in this case, with great propriety, did allege in his petition, the several causes why the non-compliance of the defendants with the condition of their bond had occasioned him damage; but we look into them in vain for that fact, which the court, notwithstanding the opposition of the defendants, permitted him to prove, in relation to the real property. The only thing that we find respecting it, is the averment that it was seized; and this is all the defendants could be expected to come prepared to meet. Proof that it was damaged and deteriorated in value, was, therefore, giving evidence of an injury not alleged, and was a violation of the rule that the *allegata* and *probata* must correspond.

The second bill of exceptions was taken to a refusal of the judge to admit certain acts offered in evidence, to show, the plaintiff had, previous to leaving the state, made several fraudulent conveyances of his property; that the security given by him had become insolvent; and that efforts had been made by him to remove his property out of the Parish of St. Landry, and, subsequently beyond the jurisdiction of the court. This testimony was objected to on the ground that these facts made no part of the allegations contained in the petition filed in the suit in which the attachment issued, and were not admissible in mitigation of damages.

This objection has been very ingeniously argued in this court, but we are unable to yield our assent to it. If, as the argument assumed, the petition had been confined to an allegation of the actual injury sustained by the property of the plaintiff, from the defendants' breach of the condition of the bond, then, perhaps, the position taken would be tenable. For as the obligors, by the terms of the obligation, bound themselves to do a certain act, or pay damages for the non-performance, no matter what might be their motives for making such an agreement, they must abide by the contract they voluntarily

entered into. But the petition does not stop with an allegation of injury for the breach of the bond. It alleges, that the principal in it, sued out the writ of attachment with a view to harass, oppress and injure the plaintiff; and that, by reason thereof, damages beyond those mentioned in the penalty had been sustained. When, therefore, a legal process is alleged to have been taken out from bad motives, to enhance the damages, we are clear the defendant has a right to rebut this charge, by showing they were good.

The third bill of exceptions requires no particular notice; we think the judge did not err in the opinion given by him. The declarations of plaintiff made a part of the *res gesta* and were properly admitted to go to the jury.

The opinion given by the judge, in relation to the matter which forms the fourth bill of exceptions, is, in our opinion, erroneous, on the principle already laid down in relation to the second. The plaintiff, with a view to show the injury suffered by him, in consequence of the seizure of his property, gave evidence he was obliged to seek refuge in the houses of his friends. The defendant offered to prove that his motives for going there were independent of any cause arising out of the attachment. This was refused; and why, we cannot conjecture. If it was competent for the plaintiff to prove the fact, and under the pleadings we have no doubt it was, it was surely open for the defendant to show why that fact occurred. If it had a tendency to increase the damages the plaintiff claimed, the defendant had a right to mitigate those damages, by showing it to be unconnected with the injury for which suit was brought.

The point of law involved in the fifth bill of exceptions, was, in our opinion, correctly decided by the judge *a quo*.

The defendant offered to prove that soon after the plaintiff's departure for France, a witness called at the house where he had lived, and was informed by a member of his family, that she did not know where he was gone; and that the witness communicated this fact to the defendant Debaillon. The plaintiff objected to this proof, because it was hearsay, and that the member of the family ought to be produced. The judge being of the same opinion, his decision, rejecting the testimony, forms the ground of the sixth bill of exceptions.

Our attachment law requires the plaintiff to swear to his belief of facts in relation to the defendant, which must be ascertained, by inquiries into all the circumstances of his departure—his declarations to others—and by common report. When the correctness of the plaintiff's proceedings subsequently became a subject of investigation, he had a right to give in evidence all these circumstances; and all the declarations, either of the defendant or others, from which the belief was formed, in relation to the removal contemplated, or effected by his debtor, and the motives of that removal. The testimony, therefore, offered in this case, should have been admitted. The objection is, that the woman is the best witness and should have been called; but we think differently. If the evidence offered had been

in relation to any fact within that woman's knowledge, she certainly ought to have been produced, and what she said respecting it would not be the best evidence. But whether she told the truth or not, that which she stated was a circumstance, with others, to go to the jury, to show under what impressions the plaintiff acted: and of her declarations those who heard her, were as good witnesses as she could be.

The seventh bill of exceptions has been abandoned before this court: the opinion stated in it, to be given by the judge, was clearly correct.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the cause be remanded for a new trial, with directions to the judge *a quo* not to admit testimony of the injury done to the real property; and not to reject evidence such as that stated to have been offered by the defendants in the second, fourth and sixth bills of exceptions taken by them, on the trial of this cause. And it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Simon and *Garland*, for the plaintiffs.

Lesassier and *Brownson*, for the defendants.

Howe's Heirs *v.* Brent. VI, N. S. 248.

FIFTH District.

Claims for the professional services of an attorney are barred by the lapse of three years since the services were rendered. See Morse *v.* Brand, 2 *N. S.* 515.

M'Micken *v.* Brent. VI, N. S. 249.

FIFTH District.
The general issue is waived by the plea of payment.

De Lahoussaie *v.* Judice. VI, N. S. 251.

A judgment does not give to the plaintiff the plea of *res judicata*, as to a claim of the defendant against the plaintiff, existing before the judgment, when the claim was not pleaded in compensation.
Every act, in which the word *donation* is used, is not necessarily a donation.

COURT of Probates of St. Martin's.

MATHEWS, J., delivered the opinion of the court.

The object of the present action is to recover sums of money, which the plaintiff claims as a creditor of the succession of her late husband. The petition contains an allegation, that a certain instrument, made by the plaintiff, under private signature, and purporting to be a donation of 901 dollars, is absolutely void in law, &c.

The judge of the court below, after liquidation of the accounts of the parties to the suit, rendered judgment in favor of the plaintiff for 552 dollars, from which the defendant appealed.

The pleadings and evidence of the cause show, that a suit had existed in the district court, commenced by the present defendant, against the plaintiff, which was prosecuted to final judgment; in which, the counsel for the defendant in this action insists, that all the matters now in dispute, were finally settled; the ground on which they rely for this plea of *res judicata* is, that, the cause of action now set forth existed at the time of the former suit. It does not appear that they were pleaded in compensation or in any other manner; the defendant in the former suit might have thus pleaded, and had he done so, the judgment pronounced by the district court, would pro-

bably have precluded the present pursuit. But as they were not taken into consideration in that judgment, it creates no bar to this demand.

The nullity of the act, purporting to be a donation to the pupil and daughter of the appellant, is strenuously contended for; and in support of his positions, the counsel refers us confidently, to the text of the law on the subject of donations, and several commentators. These authorities, it is believed, would maintain the plaintiff in his pretensions, were the instrument to be considered absolutely as a donation: although the word donation is used in the act, yet taken according to the evident intentions of the party, as reciprocally expressed by the whole context of the instrument, we are of opinion that it evidences a compromise of difficulties, and mutual releases. The judge *a quo*, in deciding the cause, properly recognised the validity of this act.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Simon, for the plaintiff.

Baker, for the defendant.

Le Blanc *et al. v.* Viator *et al.* VI, N. S. 253.

Vacant lands do not pass generally without a written grant.

But to this there are exceptions.

In an action of trespass for cutting timber, the measure of damages is the value of the timber destroyed considering its distance from other timber.

Parol evidence cannot be received of an alleged practice of Spanish surveyors, to exclude swamps in surveying land granted in the Attakapas.

The doctrine of the case of Gonzalez v. Sanchez and Wife, 11 *Martin*, 207, re-affirmed: that a Spanish emigrant placed by government on the Bayou Lafourche needed not to produce a grant to establish the title to his land.

FIFTH District.

MARTIN, J., delivered the opinion of the court.

This is an action of trespass for cutting timber in the cypress swamp of the plaintiffs.

The defendants pleaded the general issue, and that they are pro-

prietors and reside on large tracts of land granted more than thirty years ago, by the Spanish government, to Francis Legura, and other emigrants from Spain to Louisiana, to whom the said cypress swamp was granted in common—and the defendants as heirs or vendors of the said emigrants, are entitled to cut and carry away cypress trees in said swamp, for the use of their respective plantations—they pleaded the prescripts of thirty, twenty and ten years.

There was a verdict, and judgment against them, and they appealed.

Our attention has been called to several bills of exception.

1. The first is to the opinion of the court, refusing to permit parol evidence to be given, that the *locus in quo* was assigned to the Spanish emigrants to Nova Iberia, by the commandants, and agents of the king of Spain, to afford them building timber—except to prove possession in support of the plea of prescription.

2. The next was to the charge of the court, that if the jury allowed damages, they should confine themselves to trespasses committed after notice of the plaintiff's title and before the inception of the suit, taking into consideration the defendants' good faith, and if the jury believed the defendants had trespassed after notice, the measure of damages should be the real value of the timber destroyed, considering the plaintiff's situation.

3. Another was to the rejection of Johnson, the surveyor appointed by the court, who was offered as a witness to prove that part of the survey, by him returned, was accurately taken from the field notes of another survey made by him, in 1814, under the authority of the United States.

4. Another was to the admission of the same person to prove, that the survey returned to this court, was returned by him, to the office of the principal deputy surveyor, and approved by the latter.

5. A fifth was to the rejection of parol evidence, that during the latter part of the Spanish government in Louisiana, no grant of cypress land was made in the Attakapas, by the govenor and commandants; that surveyors, in laying out new grants, stopped at cypress swamps in running back, and the general understanding among the officers of the king and his other subjects, was, that the cypress timber not theretofore purchased, was reserved to the people of Attakapas, in common.

6. Another was to the permission given by the court to the plaintiff's counsel, to ask one of these witnesses, "What was, in his opinion, the diminution in value of the property in dispute?" considering its situation and remoteness, from other timber, in consequence of the waste committed by the defendants.

7. The last was to the refusal to admit in evidence, a book, in which were entries of supplies, by the Spanish government, to Jerome Ganido ,a Spanish emigrant.

I. It is true, as a general principle, that patent lands do not pass without a written grant, but to this there are exceptions.

[Le Blanc *et al.* v. Viator *et al.*]

In the case of Gonzalez *v.* Sanchez and Wife, we held that a Spanish emigrant, placed by government on the Bayou La Fourche, needed not to produce a grant to establish his title to the land on which he had been located, and it is sufficient that he should establish by parol testimony, that the king's officers had placed him thereon, and designated the metes and bounds of his land; and we stated the ground of this opinion, 11 *Martin*, 207. We see no reason to be dissatisfied with it. If after locating 120 settlers, of Nova Iberia, the officers of Spain assigned a neighboring swamp in the neighborhood, as a place the lumber of which they were to enjoy in common, we are unable to say that this assignment to all cannot be proved by parol, while the assignment of a tract to each individual may. We think the court erred in the opinion to which the first bill of exception was taken.

II. It does not appear to us that the defendants were injured by the charge of the court; the measure of the plaintiff's damages, if any were done, was certainly the actual value of the timber, considering its distance from other timber.

III, and IV. The surveyor having made his return, and filed his plot, it was unnecessary to ask him any question as to the manner in which it had been effected; and it could derive no additional validity from its conformity to another plan, filed in the office of the deputy attorney-general of the United States, and approved by that officer.

V. Parol evidence was properly rejected of the alleged practice of Spanish surveyors, in excluding swamps, in surveying lands granted in the Attakapas.

VI. The district court did not, in our opinion, err in allowing the plaintiffs to ask a witness, what was the diminution in value of the *locus in quo*, (by the waste committed on it), considering the distance of other timber.—For the solution of this question was necessary to a just assessment of damages, according to the rule we have laid down in considering the second bill of exception.

VII. The book of Jerome Ganido, between whom and either of the parties, there appears no connection, cannot be evidence for the defendants. The circumstance of his having been an emigrant like them, and having received supplies from the royal stores, are of no use in deciding the present case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, the verdict set aside, and the case remanded to the district judge, directed to allow parol evidence of the assignment of the *locus in quo*, as a common to the settlers—and that the plaintiffs and appellees pay costs in this court.

Simon and *Brownson*, for the plaintiffs.

Baker and *Bowen*, for the defendants.

Broussard *v.* Declouet. VI, N. S. 259.

FIFTH District.

A bailment of cotton to be ginned is for the mutual benefit of the parties, and the bailee is bound to use that care which prudent men bestow on their own concerns, and defendant, bailee in this case, shows this care by proving that the loss of plaintiff's cotton was the result of an accident which he could not prevent by the care, prudence and foresight which prudent men use in their own concerns.

Griffith *v.* Towles. VI, N. S. 261.

FIFTH District.

The assignment of a judgment obtained in Mississippi, written on the back of a record of the judgment, *decided*, to be an act under private signature, and requiring to be proved before it could be introduced in evidence.

Masse's Heirs v. Pierre *et al.* VI, N. S. 263.

It is a fatal objection to a will offered as an authentic nuncupative one, that no mention is made of its having been written by the notary.

On the allowance of the various objections, the court will not reserve to the party offering it, the faculty of presenting it as a nuncupative will by private act.

FIFTH District.

PORTER, J., delivered the opinion of the court.

This is an action by the legal heirs of one Magdelaine Masse, f. w. c., claiming from legatees under an alleged will of the deceased, certain property in their possession. Their right to it depends entirely on the validity of a testament made by public act.

Various objections have been made to the legality of this instrument, none of which we deem necessary to notice, except that which relates to the want of mention that it was written by the notary. This we consider a fatal defect. The 92d art. of the Old Code, page 228, requires, for the validity of a nuncupative will, by public act, that it must be signed by the testator and written by the notary as it is dictated, and that express mention must be made that it was so signed and written. There is no such statement in the will before us, and the want of this formality is declared, by another article of the Code, to be cause of nullity. *Merlin Repertoire, verbo Testament*, 673, 680; *Toullier, Droit Civil Francais, vol.* 5, *l.* 3, *lib.* 2, *cap.* 5, *art.* 417, 425; Civil Code, 232, art. 108.

The defendants have prayed us to reserve them the rights to show hereafter, in another suit, that this will was good as a nuncupative testament, by private act; but this request cannot be granted. It was set up by them as their title, and if it was good in any shape, it was their duty to establish it. A bill of exceptions taken on the trial, shows the plaintiff expressly contested it on the ground that we are now called to reserve for further litigation. The judgment below is sufficiently favorable to the defendants in allowing them to contest, hereafter, with the plaintiffs, the validity of the will, in case it is brought in question in relation to the other property left by the testatrix.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Davis and *Bowen*, for the plaintiffs.

Brownson and *Simon*, for the defendants.

WESTERN DISTRICT, OCTOBER TERM, 1827.

Holstein v. Henderson. VI, N. S. 271.

The authority to give more necessarily includes that of giving less.
The inferior court must carry into effect the decree of the Supreme Court, as the former understands it.
But the latter may interfere if its decree be misunderstood.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The plaintiff states that she is the owner and proprietor of a certain tract of land lying in the Parish of Rapides, on the bayou Cotile, containing ten arpents front, with the ordinary depth of forty. That heretofore, she instituted a suit against the defendant, in which she recovered fifty-seven arpents of land by the decree of the Supreme Court, that quantity being supposed to be contained within the lines by which her title was limited, when, in fact, and in truth, there is contained, within said lines, the quantity of ninety-seven arpents and a fraction, actual survey, and for which surplus, above the quantity adjudicated to her, she is entitled to recover.

The defendant pleads *res judicata*, a better title to the premises, and lastly, that the Supreme Court, through error of computation, decreed to the plaintiff a larger quantity than she ought to have had.

The nature of the titles under which the parties claim, the situation of the land which was then, and is now, in dispute; the respective dig-

nity of their titles, and the reasons why the court considered that of the defendants of a higher degree than the plaintiff's, are fully stated in the opinion pronounced when the case, to which this is in every respect similar, was before the court. It is reported, 12 *Martin*, 319.

This action, as the recital of the principal averments in the petition has already shown, is brought on the idea that the lines to which the plaintiff was limited by the decree of this court, contain ninety-seven arpents and a fraction, when, through error, only 57 67-100 were adjudged to her.

The court have examined, with particular care, the judgment rendered by them in the former suit, and they are unable to find the slightest foundation on which this pretension can rest.

From what was then stated, it appears that the contest between the parties related to a narrow strip of land lying on the bayou Cotile, containing, according to the evidence then before the court, 279 73-100 arpents.

The court then said, "if it should turn out in the investigation, that the titles of plaintiff and defendant call for the same land, it is our opinion that the plaintiff cannot recover, for they are not merely equal in dignity; that of the defendant is superior."

With the opinion of the higher dignity of the defendant's claim, it is obvious that the plaintiff must totally have failed in that action, if the whole of the title of the former could have been legally located on the tract in dispute. But from the calls of that title, the court thought, and we still think correctly, that only one half of it could be satisfied on that side of the bayou, and this half not amounting to the whole of the superficies, on which both claimed to locate their claims, it followed that the balance belonged to the plaintiff.

This was not only the necessary result of considering the defendant's title as the best, but it was almost the express language of the court; after stating its superiority, and defining its location, we proceeded to observe, "under this view of the rights of the defendant, there will remain within the limits of the tract of land already mentioned, 57 67-100 arpents of land to which, we conceive the plaintiff has exhibited title."

If, therefore, in any other part of the opinion, the court had been so unfortunate in the language adopted by it, as to have given limits to the plaintiff to claim more than the remainder which might exist within the limits already stated, those expressions would have been contradicted by the declaration of the higher dignity of the defendants' claim, by the expression of our opinion that it was to be first satisfied; that the plaintiff was only entitled to the residue; and lastly, by the decree itself, confining the plaintiff to that precise quantity, which had been already stated, remained, after the defendant's title was satisfied.

But not one word can we find, either in the opinion of the court, or in the decree rendered, which gives lines to the plaintiff's title

which would include a greater quantity than that specified by the court. The opinion says nothing of it; the decree is in these terms, "that the plaintiff do recover of the defendant, 57 67-100 arpents of the land claimed in his petition, to be taken from the upper side of the tract of 279 73-100 arpents represented on the plot beginning at A on said survey, returned in the cause, and to be laid out so as to include the original settlement of Thomas Choate."

Most properly, therefore, did the defendant set up the plea of *res judicata*, to the pretension advanced in this suit. The rights of the parties to all the land lying between the lines of Vallery and Grubb's claims were fully investigated in the former action; and if they were now before us on the merits, we see nothing which could give additional strength to the plaintiff's demand.

The defendant pleaded that the Supreme Court committed an error of computation in its first judgment, by giving the plaintiff a larger quantity of land than that which really belonged to him; and the court below, considering that the suit before it was to carry into effect the former decree of this court, corrected what it conceived to be an error in calculation, and directed the plaintiff to be put in possession of a smaller portion than that specified in the judgment of this tribunal.

The plaintiff has strongly complained of this, as, in effect, reversing the decision of this court, and making that below the controlling, instead of the subordinate tribunal. This complaint comes with a bad grace from him, as his own petition, in substance, required the inferior court to alter the decree rendered by this tribunal. For if it could have given the plaintiff forty additional arpents of the same land, respecting which the parties once litigated, and judgment had been rendered, it is not easy to see why, on the same principle, it might not have reduced the quantity adjudged to him. The authority to give more, necessarily included that of giving less.

It is true, as the judge states, that when the decrees of this court go down to the inferior court to be carried into effect, their execution must be ordered as that tribunal understands them, subject, however, to our revision, if it does not interpret them correctly; and it is true that understanding must be gathered from the whole terms of the judgment. But he erred in supposing this was a suit to carry into effect the judgment of this tribunal. From the evidence laid before us, it appears the decree of the Supreme Court rendered in the suit between these parties in the year 1822, was carried into effect in 1823; and that the land which the plaintiff there recovered, had been measured and surveyed for her.

And he erred in supposing this court committed any mistake in the calculation which it made from the evidence before it. This error is, however, more excusable, as it is one into which the parties led him, by both contending that such a mistake had been made. A concession the more remarkable, as it is in direct opposition to the evidence introduced in the former cause, on which they suffered the

court to act without opposition, and after having acted on it, acquiesced in its conclusions by failing to make application for a rehearing.

In the record of the suit formerly decided here, is found a plot of survey made after notice to the parties, and used by both of them on the argument in this court. It is there stated, that the quantity of land contained between the lines of Grubb and Vallery, is 279 73-100 arpents. We committed, therefore, no error when on that evidence, and it was the only evidence before us as to the quantity; we came to the conclusion that, after deducting 221 6-100 arpents from 279 73-100 arpents, there remained 57 67-100 arpents.

But it appears from the evidence adduced on the trial of this cause, that the quantity within these limits is only 240 48-100. If such be the fact, this evidence ought to have been produced in the other case, and in acting on this evidence, it is manifest the court below was not correcting errors of calculation into which this tribunal had fallen, but making deductions from the new proof before it.

Another question in the case, however, remains. The defendant contends that as the plaintiff has opened the judgment by bringing suit to have it altered, the whole matter is now before us on its merits, and should be decided on the additional evidence. That he waives the plea of *res judicata* in his answer, and that the court cannot supply it.

Admitting him to have a right to do so, this case does not authorise a judgment in reconvention. There is no such prayer in the answer. The demand is, not for a new judgment in this suit, but that an error in the former decree of the Supreme Court should be corrected. The error complained of could not furnish a ground for a plea of nullity, and that cannot be done indirectly, which the law will not allow to be done directly.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that there be judgment in favor of the defendant, with costs in the court below; those of appeal to be paid by the appellee.

Thomas, for the plaintiff.

Wilson, for the defendant.

Gill *v.* Jett. VI, N. S. 279.

Although the party against whom a witness is examined on interrogatories, may not be entitled to cross examine—if his opponent consents to his doing so, and gives him notice of time and place, the latter may not deceive him, by taking the deposition elsewhere, and on another day.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

This is an action of slander, in which the defendant had a verdict and judgment, and the plaintiff appealed.

His counsel relies on a bill of exceptions taken to the rejection of two depositions, the reading of which was objected to because they were not taken at the time and place mentioned in a notice given to the defendant's attorney.

The plaintiff's counsel urges, that the testimony was taken under the 424th article of the Code of Practice, on interrogatories annexed to the commission, a copy of which had been served on the defendant's attorney—that in these circumstances no notice being required by law, the plaintiff cannot be injured by the one he gave; that in similar cases, the party served with a copy of interrogatories is to add his, if any he has—that the justice who executes the commission, must confine the examination of the witnesses, to the matters stated in the interrogatories, and that neither party has a right to attend, and put to the witnesses any interrogatories, besides those annexed to the commission, and consequently, as the attendance of either party cannot be of any use, no notice is requisite, and the magistrate may consult his convenience and that of the witnesses, as to time and place.

Although the party against whom the deposition of a witness, examined on interrogatories, is taken, may not be entitled, under the Code, to cross-examine him; nothing prevents this being done with the consent of the party who produces the witness.

In the present case the plaintiff very liberally notified the defendant of the time and place at which the commission was to be executed, and informed him he was at liberty to be present and cross-examine. This dispensed the defendant or his attorney, from the trouble of preparing interrogatories. But the plaintiff had no right, after the liberality he had exercised, to deceive the defendant, by examining the witnesses at another time and place, than those stated in the notice.

On the merits, we see no reason to disturb the verdict.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

Boyce, for the plaintiff.

Thomas, for the defendant.

Martin v. Rutherford *et al.* VI, N. S. 281.

A mistake in writing the sum, for which the judgment appealed from was rendered, is fatal.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The petition of the appeal in this case, states, that at the May term of 1825, of the district court, a final judgment was rendered against the plaintiff; that there is error in it, and that, therefore, an appeal is prayed to the Supreme Court.

The judgment appears to have been rendered at the November term, 1824, and the appellees have prayed that the appeal may be dismissed, the judgment really rendered in the cause, not having been appealed from.

The appellant contends, this objection is cured by the joinder in error, filed by the appellees, in which they state that there was no error in the judgment of the district court.

Appearing and pleading to the merits, waives all errors of form, and irregularities in the manner the appellee has been brought into court: but can not cure such a defect as that which these proceedings present. No appeal has been taken from the judgment rendered. No issue has been, or can be joined, on the judgment really given, for the answer can only apply to the judgment complained of in the petition; and that judgment does not appear to have ever been rendered.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed, with costs.

Boyce, for the plaintiff.

Oakley, for the defendants.

Reeves *et al.* *v.* Burton *et al.* VI, N. S. 283.

An attorney is a good witness, when he is not called on to disclose facts that came to his knowledge when consulted in his professional capacity.

In testing the competency of a witness, the main question is, whether the judgment to be rendered may be given in evidence in a future suit against him.

The surety is affected by notice of the assignment of the debt given to the principal.

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

In this case, the plaintiffs sue as transferees of Montgomery, who sold to them all his right and interest in the successions of his father and mother, to which the defendants are alleged to be debtors, in consequence of the purchase of property belonging to said succession, by Burton, one of the defendants who remained mortgaged for the payment of the price, and for the assurance, whereof Martin, the other defendant, became surety in the obligations which were given for the debt.

The defendants plead a release executed to them in consideration of a compromise and payment made to the transferor, before the transfer was made, or at least, before they had notice thereof.

Judgment was rendered in their favor in the court below, from which the plaintiffs appealed.

The decision of the cause depends, principally, on the investigation of a bill of exceptions taken to the competency of a witness, offered on the part of the defendants, and to the admissibility of part of his testimony. The opposition in relation to incompetency, is based on two grounds. 1. That the witness is attorney in the cause. 2. On account of interest. The first is clearly untenable, as he is not required to disclose any facts, the knowledge of which was acquired confidentially in the pursuit of his profession. The objection, on account of interest, arises out of his situation as purchaser of part of the property mortgaged, as above stated, to secure payment of its price. As has been already shown, Burton purchased at the sale of the succession of Montgomery, the father of the transferor to the plaintiffs; and afterwards sold to Martin, his surety, who sold to Russel, he to Baldwin, and the latter to Thomas the witness, who appears to be now, proprietor of a certain portion of the land on which a right and privilege of mortgage is claimed.

In testing the competency of a witness, the main question which arises, is: Can the judgment, about to be rendered, be legally

received in evidence in any suit which may subsequently be brought against the witness, relative to the matters litigated in the action wherein he his brought to testify.

The witness, in the present case, is then, by the evidence, to be in the situtajon of one, in our law, denominated a third person. He held property subjected to a mortgage, by which it was encumbered previous to his purchase, and is offered, to prove a release of that mortgage, granted by the creditor to his vendor and debtor, before the witness became proprietor, by a chain of titles, regularly deduced from said debtor. This is an hypothecary action, prosecuted, in pursuance of the provisions of the Civil Code, and should the plaintiff succeed in obtaining judgment against the principal debtor, by the express terms of the law, it becomes evidence, in a pursuit against the third possessor, to have the mortgage property sold. It is, therefore, clear, that the witness offered has a direct interest, to prevent a judgment from being obtained against the principal debtors, as that judgment would be legal evidence against him; in truth, the very basis of every subsequent proceeding *in rem*, which may take place, to effect a sale of the mortgaged premises, whilst in his possession. According to this test, he is evidently incompetent.

The conclusion to which we have arrived, on this bill of exceptions, renders it unnecessary to examine that which relates to the receiving oral testimony, to prove the contents of a written release, said to have been executed in 1823, and alleged to have been lost. The proof of loss, as exhibited by the testimony, would probably have authorised a substitution by oral evidence. But as the witness is incompetent, no part of his testimony can be received. A subsequent release is set up in defence, which, by a comparison of dates with the act of transfer to the plaintiffs, is found to be posterior in time. This circumstance would not impair its validity, if it should appear to have been executed, prior to the debtors having received notice of the transfer. The evidence on record shows, that they had a knowledge that the debt was transferred to the appellees, before alleged payment, or satisfaction to the original creditor, and execution of the release on his part. It is true, that no formal notification appears to have been given by the plaintiffs; but the defendants derived knowledge of the fact from one of the former. The testimony seems to confine this knowledge to Burton alone: now, as he is the principal debtor, we are of opinion, that it must affect the rights and privileges of his sureties, as they were not bound to pay, and could not regularly volunteer a payment, without requiring the principal to be first pursued. They might have paid, and been subrogated by the creditor to all his rights on the debtor; but in the case before the court, it appears that the creditor had transferred the rights to the plaintiffs, and that the debtor had notice of the transfer. The obligation of the sureties being accessory, must follow and abide the fate of that of the principal.

According to this view of the cause, the plaintiffs have clearly established a right to recover the amount claimed in the petition.

[Reeves *et al.* v. Burton *et al.*]

It is, therefore' ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, &c. that the plaintiffs and appellants, do recover from the defendants and appellees, the sum of two thousand one hundred and sixty dollars, with interest, at the rate of ten per cent. per annum on one third part of said sum, from the 1st of April, 1820; also, interest on the remaining two thirds, at the same rate, on one, from the 1st of April 1821, and on the other, from the 1st April 1822, with costs in both costs.

Johnston, for the plaintiff.

Oakley, for the defendant.

Wilson v. Baillio *et al.* VI, N. S. 288.

SIXTH District.

It is a fact judicially established, by the endorsement on the copy of the Code of Practice forwarded for the use of the Supreme Court at Alexandria, Rapides, that the Code of Practice reached Rapides on the 3d day of October, 1825.

Ganiott *v.* Havard. VI, N. S. 290.

A judgment against the assignee of part of a debt on the ground that he acquired no interest by the assignment, forms no *res judicata* against the original creditor.

After the death of a partner, the affairs of a firm may be carried on in the social name, for the benefit of the survivor and the heir of the deceased.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This action is brought on a bond, by which the defendant bound himself as surety, to one McCrummin, who had replevied a quantity of cotton, seized in an action which the plaintiff instituted against him. The petition states, that judgment was recovered against McCrummin for 800 dollars, with interest, and costs amounting to 42 dollars 62½ cents, that he is insolvent, and that the defendant is responsible for the amount, with the exception of 300 dollars, which the plaintiff has transferred to one Hollaway, and which he does not make claim to. He states that he sues for the use of King & Beatty, and Isaac Thomas.

The defendant pleads, that the plaintiff never did transfer to King & Beatty, and Thomas, the balance due on the bond. That the matters and things growing out of the demand in the petition, have already been adjudicated on in the Supreme Court, and have acquired the force of *res judicata*. That the principal in the bond, McCrummin, has paid the plaintiff the amount claimed in the petition, and more, for which overplus, the defendant is entitled to judgment in reconvention. And lastly, that the plaintiff cannot parcel out the bond to different persons.

There was judgment in the district court, in favor of the plaintiff, for 542 dollars, 62½ cents, with interest, at five per cent., on 500 dollars, from the 26th of November, 1823, until paid. The defendaut appealed

In this court, the defendant has made the following points:

1. The judgment is for 542 dollars, 62½ cents, when the prayer was only for 500 dollars.

2. The attempt to prove, that the plaintiff had funds in the hands of the principal in the bond, is too vague to merit notice. Civil Code 2257.

3. *Res judicata.*

I. The prayer in the petition is not for 500 dollars alone: but for 500 dollars and interest, and 42 dollars, 62½ cents, the amount of costs

incurred, in the suit wherein the sequestration issued. There is, therefore, no foundation for this objection.

II. We think the evidence fully justified the judge *a quo*, in concluding, that the sums pleaded as a set off, by the defendant, were compensated by another sum, which the principal owed the plaintiff, on an account different from that for which this bond was given.

III. The plea of *res judicata*, is not supported. The judgment that is offered as evidence of it, was given in a suit where assignees of a part of this debt were plaintiffs, and their claim was rejected on the ground, that a creditor could not, by assigning a portion of his claim to several persons, give a right of action to each against his debtor. In this case, the creditor himself sues for the whole balance due. There are neither the same parties, nor the same subject matter.

In addition to the points filed, it has been urged in argument, that there is no such person as Beatty; that he is dead. This may be true, and the plaintiff's right to recover remain unaffected. The suit is not brought for the use of Beatty, but for the use of King & Beatty; and it is a frequent occurrence, that partnerships, by the terms of contract, last after the death of one of the members, and are continued under the *nom social* for the benefit of his heirs. The plea filed in this suit recognises this fact, for it does not assert there was no such firm as that set out in the petition, but there was no such person as one of its members.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas, for the plaintiff.

Oakley, for the defendant.

Wm. Wilson *v.* Baillio *et al.* VI, N. S. 293.

SIXTH District.

Same case with that, *ante* 843.

Levesque *v.* Anderson. VI, N. S. 293.

In whatever manner one may bind himself, he shall be bound.
A witness who testifies against his interest, is a good witness.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The appellee has moved for a dismissal of the appeal on the ground that the condition of the bond is not *verbatim* the one required by the 575th article of the Code of Practice, in which the surety is bound only in case the appellant being cast in this court, does not pay the amount of the judgment, and it cannot be made out of his property.

The condition of the bond given, binds the surety, immediately on the appellant being cast and failing to pay.

We think the objection ought not to prevail; the appellee is more amply secured by this bond than by that required by law; and we have held that in whatever manner one binds himself, he shall be bound.

The plaintiff sues the defendant, administrator of the estate of Louisa Hoffman, to procure the rescission of the sale of a slave, bought by the former at the sale of the estate. There was judgment for the plaintiff and he appealed.

His counsel took a bill of exceptions to the opinion of the district court, who rejected Lallah Hammon, a witness offered by the defendant, to prove the redhibitory vice, on the ground that she is one of the persons entitled to the succession of Louisa Hoffman, whose estate the defendant administers, and consequently has an interest in the event of the suit.

Administrators are appointed to the estates of beneficiary heirs, and of persons entitled to a succession who desire time to deliberate whether they shall accept the succession. Civil Code, 1031, 1034. In the present case, it is not shown that the witness has accepted the succession; admitting that she has, she comes to testify against her interest, by diminishing the amount of the estate, and is a good witness.

But it is urged she is a party to the suit, a defendant, Anderson, being a nominal one, and having no personal interest in the suit, and that the testimony of parties to a suit can be obtained by interrogatories only.

She is not actually a party to the suit, although she may derive some advantage from the judgment in favor of the actual defendant;

the plaintiff could not have made her a party to the suit, for he was bound to direct his claim against the administrator. He therefore had no means to avail himself of her testimony by interrogatories.

We think the judge erred in rejecting her.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, the verdict set aside, and the case remanded, with directions to the judge to permit the testimony of Lallah Hammon to go to the jury; and it is ordered that the appellee pay costs in this court.

Boyce, for the plaintiff.

Oakley, for the defendant.

Styles *v.* M'Neil's Heirs. VI, N. S. 296.

SIXTH District.

If the transferee neglects to give notice of the transfer to the debtor, payment compulsorily made by the latter to the transferor, destroys the transferee's right against the debtor.

Gill *v.* Phillips *et al.* VI, N. S. 298.

The certificate of a jailor, of the death of a prisoner is not legal evidence, is not the best the nature of the case admits, not even so good as the jailor's oath.

If the testimony leave it doubtful whether notice to file cross interrogatories was given, the deposition ought to be rejected.

When fraud is not in issue, evidence cannot be given of the consent to a sale of slaves.

An account referred to in a deed of partition, is evidence against the heirs.

The court of probates has power to decide on sales of the immovable property of a succession.

That the court of probates has no power to decide directly, on the validity of sales of

[Gill v. Phillips *et al.*]

real estate, or to try titles thereto, is a position to which this court readily accedes. But that court possesses all powers necessary to carry its jurisdiction into effect, and when in the exercise of that jurisdiction, questions arise collaterally, it must, of necessity, decide them, for if it could not, no other court could. It is immaterial, whether these questions arise out of the sale of land, slaves, or in any other manner, if the examination of them is necessary to the decision of the issue joined.

COURT of Probates, Parish of Rapides.

PORTER, J., delivered the opinion of the court.

The petition states, that the plaintiff recovered a judgment *in solido*, against John & Abraham Philips, and that in that suit, certain property was attached; that in consequence of the mother of the defendants having interpleaded in that action, and claimed the objects seized, as making a part of the succession of Isaac Phillips, deceased; her husband, the judge of the district court, had ordered a partition of the property should be made before the court of probates. It further states, that there is much more property in the same situation in said parish, which the petitioner has a right to have partitioned; and that the widow had sold and made use of more of the succession of her husband, than that which had fallen to her share. It concludes, with a prayer that the partition should be made; that the property not attached, should be sequestered to prevent its being removed from the state, and that the widow should be held to account for the property that was wasted.

The court of probates, on motion being made to it, to carry this decree of the district court into effect, was of opinion, that it could not proceed otherwise than in the ordinary way of partition.

With this decision, the parties appear to have acquiesced; and the next thing which appears on record is, an answer of James L. Phillips and Richard L. Phillips, stating that they are heirs of Isaac Phillips, deceased, and brethren of John & Abraham Phillips; that the plaintiff has no right to sue for, or provoke a partition of any property, belonging to the succession of Isaac Phillips, deceased; that a partition has already taken place between the heirs of the succession, and those who represent them, by which all the property mentioned in the partition, was assigned to the respondents for their share in the succession as heirs, and also, to satisfy debts which said succession owed them; and finally, that John & Abraham Phillips, in whose right the plaintiff claims a partition, have long since received their portion of their father's estate.

On these pleadings, after a great deal of evidence, oral and written, was heard, the court of probates decreed a partition of the estate of Isaac Phillips, assigning the widow the one-half thereof, and the other half to his children, James L. Phillips, Richard L. Phillips, John Phillips and Abraham Phillips, in equal parts, and that, in order to effect this partition, a sale should take place. The court further decreed, that this partition should be confined to the property

in possession of the widow and heirs, and that it should not extend to the property which has been disposed of by them.

On the trial of the cause, the defendants and appellants, offered in evidence the certificate of the deputy sheriff of New Orleans, who has charge of the state prison, to show the period when a person confined in the penitentiary had died. This evidence was objected to as not being the best which the nature of the case was susceptible of. Of this opinion was the court, and rejected it.

We think it did not err. Admitting it was the duty of this officer to keep a record of the deaths of the persons committed to his custody, and that a copy from this record could be evidence, the certificate offered did not purport to be such. It is merely a statement by the jailer, that a prisoner in his custody had died. This was not the best evidence of which the case was susceptible. The oath of the person certifying, would have been higher and better proof, and consequently, the inferior evidence could not be received.

The second bill of exceptions taken by the defendants, was to an opinion of the judge rejecting certain depositions, on the ground that notice had not been regularly given to the plaintiff, so as to enable him to file cross interrogatories.

The proof in relation to the opportunity offered to put the cross interrogatories, leaves it doubtful whether it was given or not, and as the burthen of proving it devolved on the party wishing to use the interrogatories, the depositions were properly rejected.

The third was taken to the testimony of a witness, to show that one of the heirs used certain declarations, when two of the others made a conveyance of certain slaves. We think the judge erred in admitting this evidence. If the heir had made the conveyance by parol, it could not be given against him, therefore, his assent to another man's conveying it, can not be proved by oral testimony. If fraud had been expressly charged against him, and the parties had joined issue on it, then, perhaps, this proof would have been admissible; but nothing of the kind appears on the pleadings.

We are also of opinion the judge erred, in rejecting an account referred to in the fourth bill of exceptions. The account was referred to in an instrument, setting forth a partition of the property, passed in the state of Alabama, and which instrument was signed by all the heirs but one, who was represented by his mother. Whether this partition was fraudulent, and made with the intention of defeating the claims of the creditors of some of the heirs, is a question totally distinct, from the legal right of introducing the document in evidence. It was objected to, because, one of the parties to a suit can not make evidence for himself. This is most true, but though he can not make evidence for himself, he can use in evidence, what those opposed to him in interest, have acknowledged against themselves, though these acknowledgments should be made in an act to which he was a party. In this suit, the plaintiff claims, in right of two of the heirs, and every thing which they did *bona fide* in relation to the estate, is evidence against them.

This cause, must, therefore, be remanded, but in directing that course to be taken, we think proper to remark, that we perceive an error in the final judgment, and as the acting on the same principle, in the decree which the probate court may again render, would create expense and delay, and finally cause a reversal here, it is better to settle the question now. We do this the more readily, as the point was fully argued, on the hypothesis, that we should be obliged to go into the merits.

By the terms of the judgment, the inventory and appraisement are limited to the property in possession of the widow and heirs, and that portion which had been disposed of by them, is expressly excluded, the court being of opinion it had no power to decide on the validity of these sales; and the notary is directed to make a partition between the parties of this property.

That the court of probates has no power to decide directly, on the validity of sales of real estate, or to try titles thereto, is a position to which this court readily accedes. But that court possesses all powers necessary to carry its jurisdiction into effect, and when in the exercise of that jurisdiction, questions arise collaterally, it must, of necessity, decide them, for if it could not, no other court could. It is immaterial, whether these questions arise out of the sale of land, slaves, or in any other manner, if the examination of them is necessary to the decision of the issue joined. Any other construction would present a singular species of judicial power—the right to decree a partition, without the authority to inquire into the grounds on which it should be ordered, or the portions that each of the parties should take. The end would thus be conceded without the means. But the rule in all cases of this kind is, *cum quod conceditur, conceditur et hoc, per quod pervenitur ad illud.* This point was decided at the last term of the court, for this division of the western district, in the case of Baillio *v.* Wilson.

The court of probates, therefore, did not want the power to decide on sales of the slaves, and immovables of the succession, and if any such were made by the heirs, it was its duty to have passed on them, and then to have sent the parties before the notary to make up the account, and allot the share to each. There cannot be a question, that if some of the heirs of the succession, sell property belonging to it contrary, to law, they are responsible to the co-heirs, for so much as they have thus illegally disposed of; and it would be doing a great injustice, to permit them to take a share of the effects that remained when that part which they had alienated, amounted to, perhaps, more than their portion. An article in our Code, declares, that the notary in making the partition shall include in the account, those sums which each of the co-heirs may owe, by reason of damages or injury, which may have been caused by his fault to the effects of the succession; *a fortiori* must be included what he owes, when he has made away with them altogether.

It is, therefore, ordered, adjudged and decreed, that the judgment

of the court of probates, be annulled, avoided and reversed, and that this cause be remanded for a new trial, with directions to the judge not to admit declarations of one of the heirs, at the time a sale was made by others, and not to reject the account referred to in the fourth and last bill of exceptions, taken by the defendants, on the ground, that the parties could not make evidence against themselves, and it is further ordered, that the appellee pay the costs of this appeal.

Thomas, for the plaintiff.

Scott, *Johnston* and *Boyce*, for the defendant.

Oakley *v.* Phillips. VI, N. S. 306.

COURT of Probates, Parish of Rapides.

If the interest on which the right to appeal be denied in the Supreme Court, the case must be remanded.

M'Nutt *v.* Boyce, Syndic. VI, N. S. 308.

COURT of Probates, Parish of Rapides.

Held, an overseer is not a domestic within the meaning of the old Civil Code, 488, art. 77; the word *domestics* applies to those persons who are employed in the house, and not to those engaged in conducting and managing a plantation.

Phelps *et al.* *v.* Overton. VI, N. S. 309.

SIXTH District.

A citation of appeal is improperly served on the attorney on record, when the appellee resides in the state. Code of Practice, 582.

Broussard *v.* Philips. VI, N. S. 309.

SIXTH District.

The third possessor can not be called on till thirty days after a demand on mortgage. Code of Practice, 48, 70.

Wells *v.* Hunter. VI, N. S. 311.

SIXTH District.

If the defendant plead that the injunction was improperly issued by a judge of another district, when that of the district was absent, he cannot give, in evidence, that the plaintiff is without title, as the slave was brought into the state contrary to law; for, inasmuch as possession enables plaintiff to maintain the injunction, a forfeiture for breach of positive law, cannot be set up and examined collaterally in such a case as this.

Baker v. Voorhies. VI, N. S. 312.

The party who takes a deposition, must see that the commission be duly executed and returned, and to this end must see that the questions of his opponent be answered.

The clause in a private act of sale that has been acknowledged by the parties, whereby vendor confesses the receipt of the price, cannot be contested by vendor, under pretence of the exception of *non enumeratâ pecuniâ*.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

The petition states that the plaintiff sold to Woods, a slave, by a private writing, on which he acknowledged the receipt of the price, although it was not paid; that the vendor is dead, and the defendant, curator of his estate, is about to sell the slave for cash, contrary to law. The prayer is, that the plaintiff may have judgment for the price, and that the defendant may be enjoined from selling the slave for cash.

The defendant pleaded the general issue; that the injunction was asked merely to create delay.

The injunction was dissolved, the defendant had judgment, and the plaintiff appealed.

The defendant's counsel relies on a bill of exceptions taken to the opinion of the court of probates, who refused leave to read the deposition of his witnesses, taken by commission and on interrogatories, on the objection of the defendant and appellee, that his interrogatories, added to those of the plaintiff, were not answered.

It is urged, if a defendant withhold the answers to his interrogatories, or otherwise prevent their appeareance, or if the magistrate is in fault, the plaintiff ought not to suffer. It is true, that if it be through the act of the defendant, that the answers to his interrogatories do not come up, the plaintiff ought not to suffer; but the plaintiff should show the interference of the defendant, if he wishes to avail himself of it. This is not done in the present case. It appears the defendant added his interrogatories to the plaintiff's; this is all he was bound to do. The plaintiff was then to have the commissions duly executed and returned. If it be not so, the depositions cannot be read, for the reading of them would do injury to the defendant, who is in no fault; the plaintiff who undertook to procure testimony, must suffer the consequence if by accident or otherwise, the testimony does not arrive in such a plight as to be used. The testimony was therefore correctly rejected.

On the merits the plaintiff has admitted, in the bill of sale, he received the price. The bill is posterior in date, to the promulgation of the new Civil Code, which provides that "the acknowledgment of payment made in an authentic act, cannot be contested under the pretence of the exception *de non numerata pecunia*, which is hereby abolished," 2234.

It is contended that, the first branch of the article relating to authentic acts only, the latter must be confined to cases in which there is such an act; otherwise the adjective authentic has no meaning; to this it may be answered that if the exception be abolished, in cases of authentic acts, the whole of the last branch of the article is without use; for, in the first branch, the legislator had virtually though impliedly abolished the exception.

Farther, the bill of sale being acknowledged has, between the parties, the same credit as an authentic act. *Ibid.* 2239. To this act acknowledging the receipt of the price, and being entitled to the same credit as an authentic one, the acknowledgment in it cannot be contested.

But the injunction was claimed by the plaintiff, not only as creditor of the price, but as a creditor of other sums due by the estate; of this there was not a tittle of evidence produced.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed, with costs.

Boyce and *Gorton*, for the plaintiff.

Thomas, for the defendant.

Barker *v.* Voorhies, Curator. VI, N. S. 315.

SIXTH District.

The appeal will be dismissed if the judge who grants it does not fix the sum for which security is to be given on the return day. Code of Practice, 574.

Scrivener *v.* Maxey's Heirs. VI, N. S. 317.

SIXTH District.

Appeal bond made payable to the governor of the state, not to appellees; *held*, bad: appeal dismissed.

Davison *v.* Chabres' Heirs. VI, N. S. 317.

If the vendor be not subrogated to his vendor's right of warranty, he cannot resort to the warrantors of the latter.

Quære, whether, the wife being in community with her husband at the time the sale was made to him, the warranty for one half did not extend to her as partner, and whether her buying all the effects at the probate sale of the community goods did not destroy that right of warranty in her.

SIXTH District.

PORTER, J., delivered the opinion of the court.

The petitioner states that she is widow of one Dominique Davison, who, on the 18th June, 1811, purchased from the ancestor of the defendants, a slave called Adelaide, with her three children. That at the death of her husband, in the year 1814, she purchased the said slaves with their increase, and by the conditions of said sale, she became subrogated to the right of warranty stipulated by Chabres in favor of her deceased husband.

She further states that she continued in possession of said slaves, and was at great trouble and expense in maintaining them and their increase, and that she has been evicted from the possession of them by a decree of the Supreme Court, and that, in addition to the loss of the slaves, which were worth 4000 dollars, she expended 1000 dollars in defending the suit.

That Chabres, the vendor to her husband, has departed this life, leaving as heirs, Carmelite Chabres, the wife of L. Hazleton, and F. Chabres; that they have taken possession of his estate, and have done

various acts as pure and simple heirs of their ancestor. That they have also accepted the succession of their mother, who was, at the time the warranty was stipulated in the sale to the petitioner's husband, in community with the ancestor of the defendants. And that by reason of all these things, the defendants have become liable to pay to the plaintiff, the sum aforesaid, more particularly, as they have had notice of the suit by which she was evicted, but failed or refused to defend it.

By the first answer filed, the defendants pleaded,

1. The general issue.

2. That they are not the immediate warrantors of the plaintiff.

3. That they had not notice of the suit. That if they had, they had a good defence to make to it.

4. That they are not responsible *in solido*, but if at all, only for their virile share.

5. That Francis Chabres, one of the defendants, was a minor when his father and mother died, and cannot be answerable for more than one-fourth of his father and mother's estate.

And lastly—That they were both minors when their father died; that his estate was worth nothing, and that they cannot be made responsible out of their own property.

In the first amended answer, they further pleaded:—

That if the negroes sued for and recovered from the petitioner, ever were in possession of Case, the plaintiff in that cause, they were his property, and not his wife's; that the petitioner lost them through her own negligence, and failed to notify the respondents, and call them in warranty. That if they were sold as the property of Case it was for a debt contracted during the marriage with his wife, for which she was responsible, and that she was otherwise stopped from claiming the negroes from the present plaintiff. That the negroes sold by the ancestor of the defendants were purchased at sheriff's sale, as the property of D. Case, at the suit of Wm. Montgomery of New Orleans, and that they are bound in warranty to him.

This answer concludes with a prayer that the representative of Case & Montgomery may be cited in warranty.

The second amended answer only repeats certain averments contained in the first.

The third averred that the plaintiff had a perfect title to the slave from which she was evicted by prescription, but she failed to show that David Case was the original debtor of Montgomery, and was equally bound with his wife for the payment of the mortgage under which said slaves were sold.

That if the respondents are at all bound in warranty, they are only bound for one-half so much of the price paid, as the probable length of time which the slaves have yet to live, may be assessed to be worth.

The curator of Case pleaded that the district court had no jurisdiction of the case; that all claims against the estate, he represents, must

be brought in the court of probates.—Montgomery, who was also cited in warranty, answered, by denying all the allegations in the answer of the defendants; and that he is not responsible in warranty.

Evidence in support of the allegations contained in their pleadings was introduced by the parties, and the court below gave judgment of nonsuit, on the ground that the defendants were not the immediate warrantors of the plaintiff, and could not in the first instance, maintain an action against them.

The general rule certainly is, that the vendee, in an ordinary contract of sale, who has not taken an express subrogation of his vendor's right of warranty on the person from whom he bought, cannot, in case of eviction, maintain an action against the first seller. The only difficulty we have had in coming to a conclusion in this case, is, whether it did not present an exception to the rule. It has occurred to us that the wife being in community with her husband, at the time the sale was made to him, the warranty of one-half at least of the property extended to her as partner, and that the circumstance of her having bought the whole of it at the probate sale of the community effects, would not destroy that right; or, in other words, that she would be at liberty to refer back to her original right, as vendee, of the ancestor of the defendants. We are not, however, to be understood to express a positive opinion on this point. It is not free of difficulty, and the facts, as proved in evidence, do not require of us an opinion in relation to it.

It appears that the sale to the plaintiff's husband was during their marriage, and it is a presumption of law that the effects found in the possession of husband and wife, at its dissolution, are common property. But in the instance before us, that presumption, if not destroyed, is greatly weakened by the title introduced by the plaintiff herself, from which it appears, that the slaves were bought by her, not at the sale of the property held in community, but of the succession of the husband. The answer of the plaintiff, when sued by the person by whom she was evicted, contained the same averment. This leaves the case doubtful; and as the duty of making it clear, devolved on the plaintiff, we are not authorised to reverse the judgment of the court below.

It is, therefore, ordered, adjudged and decreed, that it be affirmed, with costs.

Thomas, for the plaintiff.

Boyce and *Johnston*, for the defendants.

Hughes *v.* Hook's Heirs. V, N. S. 323.

SEVENTH District.

The Supreme Court cannot take cognisance of a case referred to it by a district court, without an appeal having been prayed for and granted; the case having stood several years in the court *a qua*, and the district judge, doubting his jurisdiction over it, and thereupon refering it to this court.

Yocum *v.* Bullit *et al.* VI, N. S. 324.

Property fraudulently sold by the defendant, cannot be sold under an execution against him, until the sale be set aside.

Such a sale cannot be set aside, in a suit to which the vendee is not a party.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

This is an action against a sheriff and the plaintiff on a *fieri facias* on which the present plaintiff complains that several slaves of his were illegally seized to satisfy a judgment against a third party, and prays that he may be quieted in his title and possession, that all future proceedings in the case may be enjoined, and past ones annulled and avoided; and that he may recover damages.

Bullit, the sheriff, pleaded he levied the execution as sheriff, according to the directions of the other defendant, the plaintiff therein.

Ball pleaded the general issue, that the slaves seized were the property of the defendant in the execution, and the conveyance to the present plaintiff is fraudulent and void; that it is a donation, and is void for want of acceptance; that it was not recorded in the parish of Natchitoches.

There was a verdict and judgment for the defendants, and plaintiff appealed.

The record shows the slaves were conveyed by the defendant in

the *fieri facias*, by a sale under private signature recorded in the office of the parish judge of St. Landry, where the sale was made. If the sale was fraudulent, it must be regularly set aside, by a suit instituted for that purpose. It was not less a sale, and binding upon third parties, until declared null in an action which the law gives; *Cur. Phil., Revocatoria, no.* 2; and the possession of the vendee was a legal one, until avoided in due course of law. St. Avid *et al. v.* Weimprendre's Syndics, 9 *Martin*, 649.

The same point was determined during the last term in the eastern district, on which we held that a conveyance, alleged to be fraudulent, cannot be tested by the seizure of the property, or estate belonging to the vendor; and an action must be brought to annul the conveyance; Barbarin *v.* Saucier.

The plea of the sheriff cannot avail him. He was authorised to seize the property of the defendant in the execution and became a trespasser by seizing that of a third person. The instructions of the plaintiff afford him no protection.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the defendant be enjoined from any proceedings on the seizure of said slaves; and the case be remanded to assess the plaintiff's damages.

There is a plea in a supplemental petition, in which it is stated, that a sale has taken place on which a twelve months' bond was taken, the cancelling of which is prayed. This, we think, cannot be done. We do not see that the plaintiff has any interest in requiring it. It could not be ordered without setting the sale aside, which cannot be done in a suit to which the vendee is not a party.

It is further ordered that the defendants pay costs in this court.

Rost, for the plaintiff.

Morris and *Thomas*, for the defendants.

Arpine's Heirs *v.* Harrison and Wife. VI, N. S. 326.

SEVENTH District.

Decided, that the possessor of land cannot avail himself of prescription, until he performs the condition imposed on him by the act under which he entered; and it seeming now impossible that defendants should comply with that condition, their right under the contract has perished.

Defendants claimed by prescription under a possession of twenty years, the plaintiffs being non-residents: but it appeared that of plaintiffs one had only arrived at majority nine years ago, the other five since, when, only, could prescription run against them. The evidence, therefore, does not support the plea of prescription.

Thomas *v.* Callihan's Heirs. VI, N. S. 329.

SIXTH District.

A judgment of nonsuit forms no *res judicata*.

A *sous seing privé* has no effect on the rights of third parties, until its date be fixed by something *dehors* the instrument. Old Code, 368, art. 122; Louisiana Code, art. 2613.

Baillio *et al.* v. Maria C. and Wm. Wilson. VI, N. S. 334.

COURT of Probates Parish of Rapides.
Sickness of leading counsel, is good ground for a continuance.
Tutor rendering account should be allowed a reasonable time to answer objections to his account.

Strong v. Morgan. VI, N. S. 336.

SEVENTH District.
A case of facts.

Milligan's Heirs v. Hargrove. VI, N. S. 337.

Plots of survey, unless issuing with the title, or assented to by one of the parties, do not make evidence *per se*.
The right of pre-emption accorded by the act of congress of 1814, is not such a title as enables the settler to plead prescription before the time he purchases.

SIXTH District.

PORTER, J., delivered the opinion of the court.
This action is in relation to a tract of land which the petitioners

claim in virtue of a title emanating from the Spanish government. The defendant's title is founded on a purchase from the United States.

The plaintiffs' has also been confirmed by our government, so that the main question in the cause was, as to its location. On this point, a vast mass of contradictory evidence was given in the court below, and a jury, to whom the case was submitted, found for the defendant.

According to the well settled jurisprudence of this court, that verdict, founded on doubtful testimony, must prevail, unless it should appear that some errors in law were committed, in placing the evidence before the jury.

The plaintiffs complain of several; in the admission of illegal testimony, and in the charge of the court.

On the trial, the defendant offered in evidence a plot of survey executed by the principal deputy-surveyor of the United States, purporting to be a true representation of the surveys of the private claims, therein specified, and of the manner and extent in which they interfere with each other, as they have been surveyed and returned to the office by the deputy surveyors." This document was objected to on the grounds "that it constituted no part of the defendant's title, that it was not such a plot as the officer certifying it had a right to make, so as to render it proof against parties who had no notice in relation to it, and that no plot can be admitted in evidence, which is not made under an order of court, and the parties to be affected thereby notified of the time of making the same.

There arises frequently, in the inferior courts, confusion, in relation to the introduction of plots of survey in evidence; and that confusion, and the errors consequent thereon, proceed from giving them a higher degree of importance than they are, in fact, and in law, entitled to; and from not distinguishing the use that may be made of them, in applying testimony, instead of considering them proof in themselves. Nothing can be clearer, than that what is said and done by third parties can not be evidence for or against those who are litigating their rights before a court of justice. It follows, therefore, that a representation in the form of a plot presenting to the eye, a picture, as it were, of that which has been done by others, can not be evidence. But although not legal proof, it may be used by the parties to explain the evidence, and by the court to apply it. When witnesses give testimony how lines run, and how they intersect and interfere with each other, it is almost impossible to understand them without a diagram, which will enable those who are called on to decide, to follow with the eye the testimony that is received in relation to them. Hence it is, that in almost all contested cases of this kind, courts direct surveys to be made, not, as is frequently supposed, in the intention that the lines which the surveyor may run, and represent on paper, at the desire of either plaintiff or defendant, should be evidence; but to enable the court to understand and apply

the proof, which either party may produce, in support of the lines contended for. The notice generally directed to be given of the time and place of making these surveys, is to enable the parties to have their pretensions exhibited, and to enable them the better to detect any errors into which their adversary may fall. But though such a direction is extremely proper, when the making of the survey is within the control of the court, it does not follow that one executed without notice, may not be referred to, to enable an application to be made of the proof given in relation to those lines, when there is evidence before the court, that these lines are faithfully delineated on the plot.

When the survey issues with the title, or afterwards, if it makes a part of it, it becomes evidence, under another rule. But with this exception, no survey is proof *per se*, against parties in a court of justice, unless it appear that they have assented to it, as containing the truth. In this case, the survey which made no part of the title, was admitted to go to the jury as evidence for the defendant, and against the plaintiffs, and in this we think there was error. The representation made in the office books of the United States, of the stream on which the *locus in quo* was situated, and the manner in which the adjoining titles were located, was not proof against the plaintiff; it was *res inter alios acta.*

The next question to be examined, arises out of an exception to the opinion which the judge expressed to the jury in relation to the defendant's plea of prescription. He charged the jury "that the right of pre-emption under the act of congress of 1814, vests such a title from the date of it as may be the basis of a ten years' prescription; and that this opinion grows out of the views of the Supreme Court upon a like plea, under the act of 1805.

The act of congress, which, in the opinion of the judge, formed a proper basis for prescription, provides that every person, or the legal representatives of every person of certain settlers therein described "shall be entitled to pre-emption in the purchase thereof, under the same restrictions, conditions, provisions and regulations, in every respect as directed by the act," &c. &c. 1 *Mart. Dig.* 352, *sect.* 5.

To enable the prescription of ten years to be successfully pleaded, there must be possession, good faith and just title. The latter is designated to be that which in its nature, is translative of property. Tried by that test, this law does not confer a title; it only holds out to the party, a right to acquire one. It gave him an opportunity to obtain one if he chose, but made his right depend on his giving his assent, and paying the price. The case can not be distinguished from an offer from an individual to sell, with a promise not to sell for a certain time, to another, where it is clear that he to whom the proposal is made, is not the owner until he closes with the offer. The promise to sell, only amounts to a sale when there exists a reciprocal consent of both parties, as to the thing, and the price; nothing here shows the consent of the defendant, until the time when he entered the land, and paid the purchase money. Civil Code, 346, art. 9.

[Milligan's Heirs v. Hargrove.]

The case decided by this court, under the act of 1805, though similar is not the same—There, the act of congress gave a title to settlers who had an inchoate right under the Spanish government. Nothing was to be done by the individual in possession; it was not, as in this, conferred if he paid the price, but given because he had already settled and occupied. The moment the law passed, the possessor had a right to consider himself the owner; the certificate he might afterwards obtain, was but the evidence of it. That act of congress gave the title; this gave it, if the party in possession chose to purchase. In the case referred to, we said, nothing depended on a condition to be accomplished *in futuro*. Here, every thing material did, and that condition was, an assent to the offer to sell, and the payment of the price.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be remanded to the district court, with directions to the judge *a quo* not to admit the plot of survey marked T, and not to charge the jury, that the defendant has a good title by prescription under the act of congress of 1814; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

Scott, for the plaintiffs.

Boyce, for the defendant.

Johnston *v.* Kirkland *et al.* VI, N. S. 344.

The new Code recognises the father and mother only as forced heirs in the ascending line: this repealed the provisions of the old Code which recognised as such all ascendants.

SIXTH District.

Martin, J., delivered the opinion of the court.

The plaintiff, executor, and instituted heir to his wife, states that Kirkland, grandfather, tutor and curator, to the testatrix, and her three sisters, on the decease of their parents, took possession of the estate, and administered it; that a partial partition took place in the lifetime of the testatrix, in which she drew a lot of inferior value, and

her co-heirs became indebted to her for a sum of money equal to the difference in value of her share.

The prayer of the petition is, that a final settlement may take place, that the amount in Kirkland's hands, and the individual balance of the estate may be partitioned, and that the plaintiff may have his deceased wife's share.

Kirkland pleaded the general issue, averred himself the forced heir of the testatrix, as her grandfather, that the will was void, not being made with the requisite formalities of law, that one of the testatrix's sisters died, and he became as her grandfather, entitled to her share of the estate, as she left no issue, nor father or mother.

The other defendants, the testatrix's co-heirs, pleaded also the informality of the will, that according to the will of her great-grandfather, she could not dispose of the estate she derived from him.

The plaintiff had judgment, and the defendants appealed.

The appellee complains of the judgment, as it does not allow her interest in the property partitioned, it being land and slaves, which produce fruits.

We think the will was duly proved in the parish of Orleans, as she died there, and the will and testimony show the principal part of the estate was in the state of Mississippi. The requisite formalities appear to have been complied with.

The new Code recognises the father and mother only, as the forced heirs in the ascending line—the former recognised as such all the ascendants; and it is contended that the two provisions may stand together, and a repeal of the former provision can not be presumed. Whatever may be the rule in ordinary legislation, we have evidence that in the formation of the new Code, this presumption is destroyed. The jurists who proposed the amendments in their report proposed the substitution of the words father and mother for one or several legitimate ascendants: now it can not be imagined, the legislature meant the two provisions should stand.

The will of the great-grandfather was made in South Carolina; it is not attended with the formalities required in this state to make a good will—and no evidence is produced of the law of South Carolina in this respect. It is a nuncupative will, and has but three witnesses.

The right of Kirkland to the estate of the deceased co-heir, was disallowed by the arbitrators to whom the case was submitted; this award became the judgment of the court in which the suit was pending, and the judgment has become *res judicata*.

The claim of the appellant to interest, though raised in argument, made no part of his answer to the petition of appeal.

On the merits, we think justice was completely done.

It is, therefore, ordered, adjudged and decreed that the judgment be affirmed, with costs.

Scott and *Flint*, for the plaintiff.

C. T. Scott, for the defendants.

Nancarrow *v.* Weathersbee. VI, N. S. 347.

According to our laws on the subject of taxation, it is necessary that an assessment should be made in the manner pointed out therein, and transmitted to the collectors of taxes, before they can proceed to make their collections. In order to support a sheriff's deed made for property sold under execution, the party relying on such deed is bound to show judgment and execution.

SEVENTH District.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover a tract of land alleged to be wrongfully withheld by the defendant from the plaintiff. The cause was submitted to a jury in the court below, who found a verdict for the defendant, and judgment being thereon rendered, the plaintiff appealed.

Both parties to the suit claim title to the property in dispute, as derived from the same original proprietor. The appellant claims under a deed of sale directly from said proprietor, and the defendant by virtue of a sheriff's sale of the land, made in collection of taxes. The deed to the plaintiff is dated in 1821, and that of the sheriff in 1814, in consequence of a sale for taxes, said to have been due for the preceding year.

A correct decision of the cause depends on the validity and legal effects of the sheriff's deed. The objections made to it, are, want of authority shown in the officer to sell; and a deficiency of proof to show that he pursued all the measures required by law to give validity to the alienation of the property by him sold. The land was sold as the property of the Baron de Bastrop, under which both parties claim as above stated. According to our laws on the subject of taxation, it is necessary that an assessment should be made in the manner pointed out therein, and transmitted to the collectors of taxes before they can proceed to make collection. By this assessment the amount which each individual citizen is bound to pay for the public benefit, is definitely fixed on each and every part of his real property. It is in so many words the authority on which a collector proceeds to demand and enforce the payment of taxes; and in this respect may be viewed as analagous to an execution issuing on a judgment. Now in order to support a sheriff's deed made for property sold under execution, the party relying on such deed is bound to show a judgment and execution. It is indeed a general principle of jurisprudence, that the authority, by which an individual assumes to act for another, in

the disposition of the property of the latter, must, when questioned, be shown.

In the present case, the record exhibits no evidence of any assessment of the land, which was sold by the sheriff, or any other authority under which he acted. We are therefore of opinion, that in relation to the original proprietor and those claiming directly under him, the sheriff's deed is void, for want of proper authority, shown to have been vested in the officer who sold. See in relation to assessment, 1 *Martin's Digest, p.* 106, No. IX and X.

The conclusion to which we have arrived on the first objection to the validity of the defendant's title, renders it unnecessary to examine the second. Prescription is pleaded by the defendant; but the record furnishes no evidence to support it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court below be avoided, reversed and annulled; and it is further ordered, adjudged and decreed that the plaintiff and appellant do recover from the defendant and appellee, the tract of land claimed in his petition, with costs in both courts.

Scott, for the plaintiff.

Downs, for the defendant.

Stokes *v.* Stokes. VI, N. S. 350.

COURT of Probates.

A decree of partition cannot be appealed from. The partition must be made and homologated, to authorise an appeal. Louisiana Code, 1296–9.

Hunter *v.* Smith. VI, N. S. 351.

A party may use as evidence, any document filed in the case.
The handwriting of a clerk who is dead, in entries in his employers' books, may be proved.
A party who has taken no step to bring in a witness, cannot use his testimony taken down by the clerk in another case.

SIXTH District.

MARTIN, J., delivered the opinion of the court.

This case came up to this court, in October, 1824, and was remanded. The plaintiff had a verdict and judgment, and the defendant appealed anew. 3 *N. S.* 109.

The counsel for the appellant relies on a number of bills of exceptions:

1 and 2. The first two are to the opinion of the district court, who allow the introduction in evidence of an account of Armstrong, against the defendant, paid by the plaintiff for the latter, and filed among the papers of the suit by the defendant; and the testimony of Armstrong; the introduction of sundry due bills, the signatures of which were torn off, and which had also been filed by the defendant; and the testimony of Oliot, in relation to those due bills.

The plaintiff sought to disprove the facts stated by the defendant, in answer to interrogatories. For this purpose, the testimony of any disinterested witness was proper, and he might use any document placed by the defendant himself on the files of the court, in the case, for his defence.

3. Another bill was taken to the opinion of the court, allowing proof of the handwriting of a clerk of the plaintiff, now dead, or entries on the plaintiff's books.

This instance is stated in all the elementary books of evidence, to illustrate the cases in which the plaintiff may prove his claim by entries when on books. The plaintiff has relied on Cavelier *v.* Petit, 3 *Martin*, 188, Civil Code, art. 2244; but these authorities are evidently inapplicable.

4 and 5. The two next bills were to the admission of evidence of the former existence of the notes of the defendant, payable to the plaintiff, and to that of payments made by the latter for the former. The objection was made on the ground of irrelevancy; these notes and those payments making no part of the plaintiff's claim.

It appears the averred object of the plaintiff was to establish the

manner he had accounted for cotton sold by him for the defendant, and in what way the latter had acquiesced to a credit which he claimed. For this purpose, the evidence was clearly proper.

6. Another bill was, to the admission in evidence of what the parties had said in a conversation relating to the quantity of bales of cotton made by the defendant.

What has been said on the preceding bills is equally applicable to this.

7. The last bill is to the refusal of admitting in evidence, the testimony of a witness, taken down by the clerk during a former trial in the present case.

The defendant had taken no steps to bring the witness, who resides in the parish, and the plaintiff had a right to insist on the witness being seen and heard by the jury.

The plaintiff made an unsuccessful effort to obtain a new trial, on the grounds of the verdict being contrary to law and evidence, of surprise, and lastly, on an allegation that the jury had considered it was not their duty to weigh the evidence, or take the answer to the plaintiff's interrogatories as conclusive evidence.

The first and second grounds are particularly left to the discretion of the district court, who has better opportunities to be informed.

It is true that when a fact is denied by the party in answer to interrogatories, the answer must be taken as true, unless disproved by two credible witnesses, or one with corroborating circumstances; it is also true, that when the law, by arbitray appointment, annexes to particular evidence, force and efficacy, beyond what naturally belongs to it, a jury are bound by the rule of law, even in opposition to their own conclusion, as to the truth of the facts, from all other circumstances. Starkie, 445.

But in the present case, the plaintiff introduced testimony and documents to disprove the facts sworn to by the defendant, and the jury were the proper judges of the weight of the circumstances resulting from these documents.

On looking over the whole evidence, we are unable to say the verdict ought to be disturbed as contrary thereto; and it is not shown to be contrary to law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Thomas, for the plaintiff.

Boyce, for the defendant.

Spencer's Heirs *v.* Grimball. VI, N. S. 355.

Under the former government of Louisiana, a sale by Indians, of land assigned to them, did not incapacitate them from acquiring a right to soil in land to which they removed.

If a sale by the Indians was followed by payment of the price, and delivery of the property, no person can take advantage of an informality in the mode of making it, but the Indians. The nullity is relative. Absolute and relative nullities discussed.

The proviso in the act of congress, that under *no one claim* shall any person be entitled to more than a league square, applies to the claims of the Spanish government, i. e., *requêtes* for land approved by the governors; not to *the claims* made before the board of commissioners, or assertions of pre-existing rights.

SIXTH District.

PORTER, J., delivered the opinion of the court.

This case, with several others, growing out of the same subject-matter, and involving the same questions of law, has stood for several years on the docket, owing to the fact that one of the judges of this court had an interest in them, and that another, while at the bar, had been employed as counsel for the plaintiffs. A late act of the general assembly, has removed the objection which existed to the latter, and after a full discussion they are now presented for decision. The member of the court who is on this occasion the organ of its opinion, would have gladly declined taking any part in these causes; but the legislature having declared that being once the advocate of a suitor in our courts, is not a disqualification from becoming his judge, he is no longer permitted to consult his own feelings He has, however, endeavored, and he hopes he has succeeded, to discard all former impressions, and abandon any previous opinions which grew out of the different relation in which he once stood to the parties. In the accomplishment of this desire he has been aided by the great length of time which has elapsed since his mind was at all turned to the subject; and by the able argument at the bar, which has placed the principal questions of the case, in every light of which it is believed they are susceptible.

The suit is one for land. The title of the plaintiffs is derived from certain persons called Millar & Fulton, who, previous to the change of government, bought from the Chocto, Pascagoula and Biloxi tribes of Indians, all the lands owned by them on the Bayou Bœuf. The defendant claims the premises in virtue of a purchase from the United States. As he is in possession, he has availed himself of the legal right of persons so situated, which enables them to force their adversaries to recover on the strength of their title; and he has made various objections to that of the plaintiffs.

These objections may be reduced under the three following heads:—

1. That the Indians had no title in the land to sell.

2. That they did not sell.

And 3, and lastly, that if they did, the property which they could legally dispose of, did not embrace the *locus in quo.*

I. The first of these questions can scarcely be considered an open one in this court. It has already been decided in the cases of Reboul *v.* Nero, and Martin *v.* Johnston, that tribes of Indians, to whom lands were allotted by the Spanish officers of Louisiana, in pursuance of the laws of the Indies, acquired a legal title to the soil. That they were in every respect as completely owners of it, as those who held under a complete grant, although being considered in a state of pupilage the authority of the public officers, who were constituted their guardians, was necessary to a valid alienation of their property. Of the correctness of these decisions, we have no doubt, and we deem it sufficient to refer to those laws of the Indies on which they were professedly based. 5 *Martin*, 655; *Ibid.* 490; *Recop. de las Indias, lib.* 4, *tit.* 12, *l.* 13, 8.

But it is contended that no right was shown in the Indians to settle in one part of the country, and after settling there, to remove and place themselves on other portions of the domain, and dispose of that too, as soon as real or fancied necessity, or caprice, might urge them to such a measure. It is contended, that the Spanish laws did not confer on them any such privilege, and that the exercise of it would have been incompatible with complete sovereignty over the soil, because in this way the whole right of the nation in it might be lost. This objection appears to us of little weight when considered in relation to the laws and the policy of the country by which its validity must be tested. Spain appears to have felt earlier than any other European nation, the wrongs inflicted on the original inhabitants of this continent, and her legislation bears repeated and anxious marks of her desire to repair the injuries her ambition and cupidity had occasioned. Whether she was defeated or not in this laudable purpose by the neglect of her subordinate agents, cannot affect the argument in a court of justice. Her indulgence to those tribes of Indians who survived the conquest; her liberality, or rather justice in allotting to them particular portions of the soil she had wrested from them, and her care to make these acquisitions of value, by preventing the intrusion of white settlers, are proved by various laws, passed at different times, for the government of her colonies in America. One of these laws meets the very objection taken in this case, and directs that when the Indians give up their lands to the whites others shall be assigned to them. *Y porque a los Indios se habian de senalar y dar tierras, y aguas, y montes, si se quitaren a Espanoles, se las danjusta recompensa en otra parte. Recop. de las Ind. liv.* 6, *tit.* 3, *ley* 14. It is true this law does not specify in what mode the Indians must abandon, to enable them to enjoy this advantage; it

cannot, however, be presumed to be in the contemplation of the government to permit them to make donations of their lands to the Spanish settlers. But, be that as it may, the expressions used, do by no means authorise this court to say, that the act of the Spanish governor assigning the lands now in dispute was null and void, because they had already sold a place previously given to them. And at all events, this was a question between them or their assignees; and the general government of the United States have waived the objection by confirming (as it will hereafter be shown they have done) the alienation made by the Indians.

II. Considering, therefore, that it is perfectly clear, a title to the soil was vested in the vendors of the plaintiffs, which they might sell; whether they have sold or not is the second question, in the order in which we have stated the objections made to the plaintiff's right of recovery.

The objections taken on this branch of the subject by the defendant, went both to the sale made by the Chocto tribe of Indians, and that jointly executed by the Pascagoulas and Biloxis. But a slight attention to the relative situation of the different tribes on the Bayou will show that the validity of the sale of the former cannot be called in question between these parties in this suit. According to the evidence, the Choctos were placed highest up on the stream; the Pascagoulas next below, and the Biloxis below them. Millar & Fulton bought by two distinct instruments of writing, the right and title of the three nations. The land claimed by the plaintiffs is embraced within the lowest part of this purchase, hence, if they have any right it must be under the Biloxi tribe; consequently, whether the Choctos have regularly sold or not, may be dismissed from our consideration, as totally unconnected with the case before us.

The Pascagoulas and Biloxis sold by one public act. It was passed before the Commandant of Rapides, and afterwards approved by the governor of Louisiana. The price agreed on appears to have been paid, and possession was delivered. The defendant contends the plaintiffs have no right to recover from him, even admitting the Indians could, because, by the laws of Spain, their lands must be sold at auction. The plaintiffs reply that this informality, if it be such, is one of which the defendant has no right to avail himself; that the Indians can alone claim the benefit of it.

This question was discussed and decided in the case of Martin v. Johnston, and the defendant is wholly in error in supposing that, because there, the Indian title was presented by a defendant in possession, and here by a plaintiff seeking to obtain it, the authority of that decision has no application to this case. The plaintiff there showed a legal title to the premises, which compelled the defendant to establish one in himself; in doing so he was actor and every objection was open to his adversary, that would have been if Martin had been in possession, and Johnston plaintiff. But, as the correctness of the decision to this extent has been strongly impugned, it

may be as well to look at the subject a little more closely. It involves, in its examination, the doctrine of what is called in our jurisprudence, absolute and relative nullities; one which though clear enough in relation to those extreme cases, which suggested the distinction just stated, frequently occasions great embarrassment in its application, from the difficulty of distinguishing satisfactorily, under which head of nullity the objection falls. It is believed, however, that little can exist in relation to the case before us. Some of the writers on our law of the very highest authority, are of opinion, that it is only such nullities as grow out of prohibitions, having for their first and principal object, reasons of public utility, that strangers can set up in their defence; and that whenever the nullity is pronounced by the law more in relation to the individual, than the public, the party intended to be protected can alone claim the benefit of it. Others of equal celebrity reject the distinction, and think that, whenever the contract claimed under, is declared null for want of certain formalities, no person can claim title under it. Which of these doctrines we should incline to adopt, this case does not require us to say, nor have we any opinion formed on the matter. Taking the principles contended for by those who have pushed the doctrine the farthest, in support of the pretension set up by the defendant, the defence cannot avail him. In argument, his counsel correctly assimilated the incapacity under which the Indians were placed, to that to which minors are subject, and it was urged that a sale of the property of the latter was null and void, if not made with the formalities prescribed by law. *Toullier*, among others, puts the very case of a minor selling informally, as a voidable, not a void contract, of which the nullity is only relative; though he states, it would be different, if a forced sale, or one made by his tutor, did not pursue the forms prescribed by law. A moment's consideration as to the consequences that follow a contract with a minor, will show how sound this doctrine is. In the first place, the party contracting is bound to the same extent as if he had bargained with a person of full age. The minor, himself, too is bound, if, after arriving at the age of majority, he expressly, or impliedly approves of the alienation, or suffers the time within which he may rescind it to elapse without bringing an action to set it aside. An agreement which may produce such effects, cannot be considered null; it is only voidable, and no one can avoid it, but he whom the law intended to protect. The consequences of a contrary rule would be, that a third party, by getting possession of property to which he had no right, might have a contract declared null, which the minor, for whose benefit the protection was given, would affirm when he came of age. Into such an absurdity this court cannot permit itself to be led. *Invito beneficium non datur* is as well the maxim of law as it is of common sense, and if the party who is empowered to set aside a contract, does not choose to do it, no other can. This case shows most strikingly, we think, the justness and propriety of the rule we have been endeavoring to explain. The contract was com-

plete—there was thing, consent, price paid, and possession delivered. Whether the tribe of Indians who sold, has been swept away and extinguished by the advancing tide of civilisation, or whether some remnants of them do now still exist, the record does not inform us. But on either hypothesis, the consequence is the same, or nearly so. On the first, they have left no representatives, and the rescission of the contract never can be demanded. On the last, a quarter of a century has now elapsed, without any attempt on their part to annul the sale. With what propriety, then, can a third party seek to have it avoided! and how can he be permitted to avail himself of such privilege, when every presumption arising out of the facts of the case, compels the belief, that the parties whose right he wishes to enforce, either never can, or never will, enforce it themselves. *Toullier, Droit Civil Francais, vol.* 7, *no.* 553, *art.* 561 and 564; *Dunod, Traite des Pres. part.* 1, *cap.* 8, 47; *Nouveau Repertoire de juris, verbo Nullité, sect.* 2 and 3.

III. The last and the most difficult question in the case, is that which relates to the location of the titles under which the plaintiffs claim. It has been already stated that they derive their right from Millar & Fulton, who purchased from three tribes of Indians. The Choctos were first placed on the Bayou Boeuf; the Pascagoulas and Biloxis, last. The upper boundary assigned to the Choctos was the Bayou Robert; the lower does not appear to have been positively fixed. When the Spanish officer located the Biloxis and Pascagoulas, although they were distinct and separate communities, he gave them a joint possession, and assigned them land from the lower boundary of the Choctos, down to the mouth of the Bayou Crocodile. The whole of these proceedings exhibit a great deal of that looseness and irregularity which characterise the acts of the Spanish officers in Louisiana. Both the commandant and the governor seem to have been ignorant, or if not ignorant of, to have entirely disregarded the laws of the Indies, which limit the quantity of land each tribe was entitled to: for the space assigned to the Pascagoulas and Biloxis, far exceeds that which under the most liberal construction of those laws they should have received. But the irregularity which arose from the acts of the officers of the government, is not the only difficulty the case presents. The Indians settled so near each other that there is not a league from each village. Under these circumstances, the argument of the case exhibited a great diversity of opinion as to the true location. The counsel for the plaintiffs have not been able to agree themselves on the proper one. The defendant contends for boundaries which would place him far out of the limits of the Indian title.

Before examining the grounds assumed by the defendant on this point, it becomes necessary to notice and dispose of those taken by the plaintiffs. Their first proposition appears to us quite untenable. They have contended that by the local usages existing in Louisiana, the Indians were entitled to more than a league; and the evidence

they offer of these usages, is the assent of the governor to a sale, by which much more was sold by one tribe. Respect is certainly due to the official acts of the officers of the former government, and in the absence of proof to the contrary, we should be inclined to consider them *prima facie* correct. But in relation to the subject-matter before us, we have the law itself, which clearly limits the quantity to which Indians were entitled. Now for us to say, that a violation of that law was an evidence of an usage which controlled it, would place all laws at the mercy of those who owed them obedience.

Some of the counsel who have advocated the rights of the plaintiffs in the several causes now before us, which have grown out of the purchase from the Indians, have urged that the law only gave the superficies embraced within a square league to each tribe. Others have contended that they were entitled to a league in every direction round their village. It is unnecessary for us to decide this point, for according to the evidence, a league from the lowest village on the bayou, which was that of the Biloxis, would not reach the land claimed by the defendant.

The Chocto Indians who were first placed on the Bayou Bœuf, had lands assigned them from the place where the Bayou Robert enters into it, down to the spot occupied by them as a village. This space was about one league. Previous to their sale to Millar & Fulton, they had sold to other persons portions of this soil, and their upper limit at the time the former purchased, was near the confluence of the Bayou Clair and Bayou Bœuf, at a place represented on the plat of survey by the letters C. B. In their act of sale to Millar & Fulton, they state, that they sell the villages and fields granted them by the Baron de Carondelet, and that they do this in the presence of the Biloxi and Pascagoula Indians, who give them a sufficient portion of their land to make up the village and fields. The boundaries given in this sale are a sycamore tree above, and two sweet gums below, adjoining the lands of the Pascagoulas. In the sale from the Biloxis and Pascagoulas, it is declared that they sell from the Chocto village above, down to a limit on the bayou, which will embrace all the lands granted to them. On these facts the defendant contends that, the Choctos having sold nearly all the soil belonging to them, previous to the alienation to Millar & Fulton, and no evidence being of a new assignment to them of any land below, their lower limit must be the village; that this conclusion is strengthened by the Pascagoulas and Biloxis calling to bound the land sold by them on that village; and that at all events, all who claim under Millar & Fulton can not contest this argument, because they acknowledged, in accepting a sale from the Choctos with that boundary, that their title did not extend any further down the bayou; and afterwards purchased from the other tribes; and in the deed of conveyance, admitted that the land acquired from the Pascagoulas and Biloxis, joined upon that village above.

We trust, that this is not a weak summary of an argument which

was strongly pressed on our attention on the hearing: if correct, the two leagues which the Pascagoula and Biloxi tribes could legally dispose of, would not come near to the *locus in quo*. But whether the position assumed would be tenable or not, if the plaintiffs relied solely on the title from the Indians, we need not inquire. The question assumes a very different aspect, when they present themselves under the confirmation of the United States.

In the notice filed with the commissioners appointed by the general government to pass on the validity of land titles in Louisiana, the persons under whom the plaintiffs claim, demanded a confirmation of their title to 46,800 arpents of land on both sides of Bayou Bœuf, in virtue of purchases made from the Chocto, Pascagoula and Biloxi tribes of Indians. These commissioners after hearing evidence in support of the demand thus made, recommended a confirmation of it to the extent of 23,400 arpents. In their report, they divided the different claims on which they had passed into distinct classes, according to their dignity, designating them by different letters of the alphabet: that in relation to the Indian title was marked B. The act of Congress confirming the report, is in the following words: "the claims marked B, and described in the several classes in the reports of the commissioners for the western district of the state of Louisiana, formerly territory of Orleans, and recommended by them for confirmation, are hereby confirmed. *Provided nevertheless*, that under *no one claim* shall any person or persons be entitled under this act, to more than the quantity contained in a league square." *Ing. Dig.* 537.

It becomes necessary to inquire what was meant by the legislature in using the term *one claim:*—to ascertain whether the limitation was affixed to the claim set up before the commissioners, or to the claim under the Spanish government, in virtue of which the demand had been made. It cannot be doubted, we think, but the latter was intended, and that this results as well from the phraseology used, as from the reason of the thing. If the intention of Congress had been, that no person should obtain more than a league square of land, no matter how many original titles emanating from the Spanish government he had acquired by purchase or otherwise, the language proper to express that idea would have been resorted to, and the act would have declared that *no claimant* should have more than one league. Instead of that the expressions are, that under *no one claim* shall any person or persons be entitled to more than the quantity contained in a league square. If under more than one claim, the consequence, therefore, not necessarily, but strongly is, that they may have more.

Again, by the terms under one claim, is clearly meant the title from the former government under which the demand for confirmation was made. To apply it to the claim put in before the commissioners, would be admitting, that Congress intended to grant lands in consequence of the claim made to them, instead of the claim or *titles* which existed for them under the former government.

The language is so clear, that there is scarcely a necessity for resorting to the other rules which aid courts of justice in the interpretation of statutes. But if we recurred to one of them, the construction we have given would be greatly strengthened. It is well known that no inconsiderable part of the soil of Louisiana is covered by large grants, in regard to which the government of the United States has hitherto exhibited great jealousy. If the word *claim* in the act of Congress should be held to apply to the derivative title, instead of the original grants, they would have been confirmed by this law, for all portions of them which the grantee might have sold to an extent not exceeding one square league. That such was not the intention of Congress, we believe cannot be questioned. These observations suggest the idea, that it was still less their intention to limit the rights of purchasers who held under titles that were good by the laws of Spain. The instances were numerous at the change of government, of land originally granted out in quantities less than a league square to different individuals having centred in one person who had legally acquired them through purchase, exchange, or the other modes by which property is transferred. If these titles were all good, and proper objects of confirmation, had they remained in the hands of the grantees, no possible reason can be given why they should not be good to those who held under them. And to say that, because the latter inserted all these demands in one notice, or one claim, before the commissioners, they could only have one league, while the persons under whom they claimed would have obtained a confirmation to the whole extent of their titles, would be supposing Congress to have objections to the claimant instead of the title. Nay, it would involve a greater absurdity. For admitting the claimant to have acquired six square leagues, under so many different titles, if he had filed separate claims for each, the limitation in the act would have given him the whole quantity; but if he had embraced them all in one claim before the commissioners, he would only have had a league square.

If the foregoing observations be correct, Millar & Fulton's title was confirmed to the extent of three leagues, for they claimed under three distinct titles, existing under the Spanish government; namely, one in favor of the Chocto, another in favor of the Pascagoula, and the third in favor of the Biloxi tribe of Indians.

In the preceding opinion, we have dwelt more at length on several parts of the case than their difficulty or importance rendered necessary. But situated as the court is in the decision of this cause, we were unwilling to assume any thing, or state any conclusion, without stating at the same time the reasoning by which we arrived at it, and the premises on which that reasoning was founded.

It now only remains for us to ascertain how far the defendant interferes with the rights of the plaintiffs under the confirmation of three square leagues. The surveyor swears, that a line of three leagues from the sycamore tree (which was the upper boundary

given by the Choctos in the sale to Millar& Fulton) will not enter into the improvement of the defendant by one arpent. But he adds, this measurement was made without regard to the superficial contents of the survey, which, if observed, would give the lines a greater length and consequently extend the line further into the claim of the defendant. According to the notes which accompany the plot of survey returned into court, a line designated thereon by the letters R F T S is stated to include the quantity of three leagues between it and the sycamore stump, if the land is surveyed so as to give 40 arpents on each side of the Bayou. This mode of laying off the land is agreeable to the constant usage under the French and Spanish governments, and to the report of the commissioners, who confirmed the claim to the extent of 40 arpents on each side. The limitation in the act of congress is to quantity, and leaves the manner of location indicated in the report, untouched.

The line already referred to, embraces a part of the land claimed by the defendant and to the extent of that interference, the plaintiff must recover; but, we cannot give a final judgment, for the evidence does not inform us of the extent of that interference. The district court decreed that the plaintiffs should recover all the land which might be included within certain lines, while the judgment, to be susceptible of execution, ought to have ascertained the exact quantity within those lines, otherwise, a new suit might arise from alleged errors in the sheriff carrying the decree into effect.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; that the case be remanded for a new trial, and that the appellee pay the costs of this appeal.

Scott and *Others*, for the plaintiffs.

Wilson, for the defendant.

EASTERN DISTRICT, DECEMBER TERM, 1827.

Ford *v.* Miles. VI, N. S. 377.

If the defendant, who has obtained a new trial, waives it, and consents that judgment should be signed on the first verdict, and that the record should consist of the evidence given on the first trial, he is not thereby precluded from his appeal.

A creditor may recover from the surety, although the former told the latter, the debtor was good, and no injury would result to the surety.

EIGHTH District.

PORTER, J., delivered the opinion of the court.

This action is brought on a promissory note, by which the defendant bound himself jointly and severally with a co-obligor, to pay to the plaintiff, as guardian of the heirs of Benjamin Carman, deceased the sum of 946 dollars, with interest at ten per cent. from the 1st of March 1820, until paid.

The answer denies that the plaintiff is guardian of the heirs of Carman, and avers that the obligation sued on was given without any consideration, and upon the false and deceitful representations made by the petitioner to the defendant.

The cause was submitted to a jury in the court below, who found for the plaintiff, and a new trial was prayed for, and granted. The defendant, however, declined a second examination of the case in the court below. On his motion, the jury empannelled to try it, were prevented from rendering a verdict, a juror was withdrawn, and the

plaintiff consenting, it was agreed that judgment should be signed on the former verdict, and that the record should consist of the evidence on which the first jury passed.

It has been contended that this consent of the defendant, to suffer judgment to be signed, precludes him from complaining of the correctness or legality of it.

But we think differently. It is clearly not a confession of judgment, but an agreement that judgment should be entered on the verdict. The provision made in the agreement for preserving the evidence on which the cause was tried marks very plainly, the manner which it was understood by the parties at the time it was made. It can scarcely be doubted that their intention was to cease contesting the cause in the court below, and put it in such a shape that it could be passed on here.

A good deal has been said on the merits. The plaintiff put interrogatories to the defendant which were answered by an admission of the signature of the note, coupled, however, with the declaration that the plaintiff told him that his signature was a mere matter of formality, and that if he signed it he should not be injured. In addition to this answer, the defendant introduced witnesses to corroborate it. One of them testifies merely to the conversation he had with the plaintiff when asked by him to become surety, and that conversation was in itself immaterial. The other deposes, that he heard the plaintiff ask the defendant to sign the note, and that on making the request, he observed that the principal, E. Ford, was worth the money, that there could be no difficulty in becoming his surety, and that the defendant would not be injured in the least.

The testimony introduced by the plaintiff establishes that the defendant had declared that he had become his uncle's surety, and that when he made that declaration, he did not state that he was not to be injured, or make any observation to qualify or limit the responsibility he had incurred by his signature.

The answer of the defendant must be taken with the evidence which he himself introduced to corroborate and explain it. So considered, the impressions produced on our minds (as it appears to have been on those of the jury below) is, that the defendant was told he would sustain no injury, because the principal was solvent. There is no proof this statement was false at the time it was made, or that the defendant was not as well acquainted with the pecuniary circumstances of his uncle, as the plaintiff, and though this opinion may have turned out to be erroneous, we do not think it sufficient to avoid the contract.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Hoffman, for the plaintiff.

Ripley and *Hennen*, for the defendant.

Stewart *v.* Barrow. VI, N. S. 381.

If the cause be tried without evidence, and out of the regular time of the court, the party cannot be relieved by a *certiorari*, but is driven to his appeal.

PARISH of West Feliciana.

Application for a *Certiorari*.

PORTER, J., delivered the opinion of the court.

This is an application for a writ of *certiorari* to the parish judge of West Feliciana, commanding him to send up the proceedings in this case, and for an injunction prohibiting him from executing a judgment which he had rendered. The grounds of the application as disclosed by the petition, and supported by the oath of the petitioner, are "that on the 28th July last, Barrow, then under-tutor to the step son of the petitioner, filed a petition in the probate court of the parish aforesaid, seeking to remove the petitioner from the tutorship of her son; that on the first day of August she filed an opposition to said petition, and requested the same to be put on the docket of litigated causes for trial at the regular term of the court—that some short time afterwards, on the eighth of August, without any notice to the party opposing, or her counsel, and in their absence, and not at a regular session of said court, the parish judge of said court, without any evidence, or even setting the cause for trial, upon the petition and opposition alone, after holding a meeting which he denominated a family meeting, entered up a judgment by which he removed the petitioner from the office of tutor, and appointed Barrow in his stead.

This application has been supported principally on the rules prescribed by the Code of Practice in relation to the writ of *certiorari*. But the 857th and 858th articles of that work appear to offer an insurmountable objection to granting the prayer of the petitioner. By the first it is provided, "that the mandate is only granted in cases where the suit is to be decided in the last resort, *and where there lies no appeal*," *&c. &c.*

By the last it is declared, "that the party wishing to obtain this mandate, shall address his petition to a competent tribunal, in which he shall state the causes of nullity of the acts done by the lower court to his prejudice, *in a cause where there lies no appeal.*"

Now we see nothing here which prevents the petitioner from appealing. If it be true that the case was decided without evidence,

out of the regular term, and on the deliberations of a family meeting alone, a transcript of the proceedings will show these facts, and where there is relief in the ordinary course of proceedings, the court cannot extend the aid of a remedy which is only given in default of them.

The motion is therefore refused.

EASTERN DISTRICT, JANUARY TERM, 1828.

Johnston *v.* Bell *et al.* VI, N. S. 384.

A sale by order of the court of probates does not extinguish the mortgage of the vendor of the deceased.

The vendee who does not give his vendor notice of the claim of a third person on the land, does not thereby lose his recourse.

FOURTH District.

MARTIN, J., delivered the opinion of the court.

The plaintiff states that Seth Jones purchased from the defendants, a tract of land, which they had bought from Blake, and which the plaintiff, after the death of Seth Jones, purchased at the sale of his estate; that Blake having failed to pay the price of the land, his vendors had it seized in the hands of the plaintiff. It was accordingly sold and he purchased it; that the plaintiff has an action against the defendants, the heirs of their ancestor's verdict to recover the price he paid for the land, deducting the balance paid back to the plaintiff, and the amount of the improvements, and they have transferred their claim to the plaintiff, and authorised him to sell in his own name, and to their use.

The answer urges, that the petition ought to be dismissed, because it does not show what persons are the heirs, in whose name the plaintiff sues. The general issue was pleaded, and the authority to sue in the name of the heirs denied. The defendants denied they had any notice of the claim of Blake's vendors, and averred they

might have resisted it. They alleged that the sale of the court of probates extinguished the mortgage of Blake's vendors, and the purchase by the plaintiff was fraudulent and collusive.

He had judgment and the defendants appealed.

The appellee complains of error to his disadvantage, and prays that the judgment be amended by allowing him a greater sum in damages.

The alleged defect in the petition appears to have been obviated by a supplemental one, filed with leave of the court, in which the heirs are named.

The statement of facts shows that the premises were sold, as stated in the petition, by Blake to the defendants, who sold to Seth Jones, at the sale of whose estate, the plaintiff purchased the premises. The land has been sold to satisfy the claim of Blake's vendors.

The authority of the plaintiff to sue in the name of the heirs is proved, and the judgment of the district court is for the sum paid by the plaintiff, with interest and costs.

It is true he neglected to give notice to the defendants of the claim of Blake's vendors. By doing so he did not lose his recourse, but left the defendants at liberty to show they could have refuted the claim. This they have not shown.

The plaintiff purchased by an apparent vendee; never was out of possession, and paid nothing but what Blake owed to his vendors.

There is neither fraud nor collusion in this; but he is to be considered as the direct and immediate purchaser.

The sale of the court of probates could not extinguish the mortgage of Blake's vendors.

There has been no actual eviction. But the plaintiff has recovered a sum of money, by which recovery he is completely indemnified for this, and he has shown no other damage.

Porter, for the plaintiffs.

Morse, for the defendants.

Gardere *v.* Fisk. VI, N. S. 387.

A purchaser at a sheriff's sale may avail himself of the incorrectness of the sheriff's declarations at the sale, or of the neglect of producing the parish judge's certificate, without having pleaded it.

Every interested party may demand the production of a paper in the hands of a third person, and is bound to do so, before he may offer evidence of its contents.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The plaintiff prayed an injunction to prevent the sale of a slave he had purchased from the defendant's mortgage debtor, on a suggestion that the sum for which the mortgage was given had been paid.

The general issue was pleaded, the plaintiff had a verdict and judgment; the defendant made an unsuccessful attempt to obtain a new trial, and appealed.

His counsel relies on three bills of exceptions.

1. The first is to the refusal of the district court to allow him to file an amended or supplemental answer.

2. The next, to the introduction of parol evidence of the contents of a receipt given by him to his debtor.

3. The last, to the refusal to admit in evidence, a settlement between him and his debtor.

I. The proffered answer denied that the slave seized was mortgaged for 700 dollars only, as stated in the petition, but averred the mortgage was for 3000 dollars; that the sheriff's declaration at the time of sale, to the contrary, was untrue, and that he, the sheriff, did not then produce the certificate of the parish judge.

The court refused leave to file the answer, deeming it unnecessary, and thinking that all the evidence, of which it would authorise the introduction, could be received under the general issue.

It does not appear to us that the mortgage for 3000 dollars could be introduced without being set forth; nor that if any advantage could result to the defendant from proving the incorrectness of the allegations of the sheriff at the time of sale, or from his neglect to produce the parish judge's certificate, he could avail himself of them without giving notice of his intention to do so by plea.

II. The plaintiff's counsel contends that, as the receipt, of the contents of which he was permitted to administer parol evidence, was not in his client's power, leave was correctly granted; that the rule is not that the best possible evidence is required, but the best evidence in the party's power.

We think this reasoning illogical. Every interested party may demand the production of a paper in the power of a third party, generally speaking, by a *subpœna duces tecum*. In very few cases, indeed, special reasons may create an exception; and none is here alleged.

It is urged that the defendant and his debtor might collude and forge a new receipt. Collusion and forgery may defeat most men's right, but cannot afford protection unless proved.

III. The defendant was refused leave to read a settlement with his debtor, posterior in date to the sale to the plaintiff. By this settlement, an imputation of several payments theretofore made, was then made to other claims of the defendant, than that secured by the mortgage affecting the slave. This settlement was made at the foot or on the back of a detailed account of transactions between the parties.

The objection of the plaintiff was, that if no imputation was made of these payments by the debtor, at their respective dates, they were of course to be imputed on the mortgage debt which the debtor had the greatest interest to discharge, and the parties could not afterwards when a third party had become interested, avert to his injury, the effect of the legal imputation, at the periods of these payments.

This would have been correct reasoning, (after the settlement of the detailed account had been read,) to show that the imputations were incorrectly made. The account might then show that they were in accordance with the intentions of the parties, at the time of each respective payment; that the debts thus extinguished, were also mortgage debts, and continue in their exigibility to that to which the plaintiff contends the payments are to be applied, which might not then be payable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, the verdict set aside, and the case remanded with directions to the judge to permit the defendant to file the proffered supplemental or amended answer; not to admit parol evidence of the contents of the receipt, while its absence be not properly accounted for; and to admit the settlement at the foot or back of which is an account of the transactions between him and his debtor, the plaintiff's vendor, or which is accompanied by such account; and it is ordered that the plaintiff and appellee pay costs in this court.

Ripley and *Conrad*, for the defendant.

Lafonta *v.* Poultz. VI, N. S. 391.

The cumulation of actions is the forming together several demands against the *same* defendant: the bringing two demands together against *two* distinct defendants is no where forbidden.

FIRST District.

MARTIN, J., delivered the opinion of the court.

The defendant sold to the plaintiff a note, purporting to be endorsed by Philipon without endorsing it; Philipon being sued by the plaintiff avowed that the signature on the back of the note was a forgery, thereupon the plaintiff cited the defendant, requiring him to contest Philipon's plea, and praying judgment against him in case it was supported.

The defendant pleaded that the plaintiff's action against him was premature, the general issue and collusion between the plaintiff and Philipon.

The district court dismissed the action against the defendant, being of opinion that two distinct and separate causes of action were cumulated.

The jury gave a verdict in favor of Philipon.

The plaintiff appealed from the judgment of the court, dismissing Poultz.

The cumulation of actions is the forming together several demands against the same defendant. It is clear from the phraseology of the Code of Practice, art. 149—152, that the legislature understood it so. Here two demands are made against two distinct defendants—the bringing such demands together is no where forbidden; and, by a strong analogy to the case of a vendee who resists a claim against the property sold, and calls in his vendor to contest the plaintiff's demand, and prays that in case the latter succeeds, he the vendee and defendant may have judgment against the person he brings in, the present action against the appellee is supported.

The appellee had sold to the appellant a paper, which although of no value appeared on its face to be valuable, it was literally nothing; the consideration of the sale is clearly recoverable on the establishment of the fact. The appellant took the best mode he could to recover the money from the endorser of the paper—this person averred it to be a forgery. The appellant, that he might not be charged with neglect, called on his vendor to resist the pretensions of the endorsers if they were unfounded, and prayed that if the endorser succeeded, he the plaintiff should have judgment against his vendee.

There is a close analogy between this case and that of vendee and warrantor—the same reasoning supports them both. A multiplicity of actions and delay are avoided by the mode referred to, and the best possible means is afforded to the party brought in, to establish the genuineness of the paper he sold—and it is very difficult to discover on what ground this mode of proceeding may be injurious to him.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court in favor of the appellee, be annulled, avoided and reversed, and the case remanded with direction to the district court to proceed therein according to law; and it is ordered that the appellee pay costs in this court.

Seghers, for the plaintiff.

Hennen and *Morphy*, for the defendant.

Dicks *et al. v.* Chew *et al.* VI, N. S. 394.

THIRD District.

Held, that the certificate of the notary, who protested the note, is admissible in evidence, although it does not establish every fact necessary to prove plaintiffs' claim: in this case for instance, it gave the names of the drawers and endorsers, the date of the notices, the manner in which they were sent, and it appears to have been duly recorded; but it omits to state what post-office the notice was put into, and to show that the letter notifying the endorser was directed to the post-office nearest his residence. Yet was this admissible in evidence, and as for its weight, that properly belonged to the jury.

Dicks *et al.* v. Maxwell *et al.* VI, N. S. 396.

An incomplete instrument, which has not received the signature of the parties, is inadmissible in evidence.

SIXTH District.

MATHEWS, J., delivered the opinion of the court.

This suit is instituted against two of the acceptors of a bill of exchange by the holder thereof, under endorsement. Payment is claimed from the defendants as two of the partners of a commercial firm by which the bill is alleged to have been regularly accepted. Judgment by default, which was afterwards made final, was obtained against Wilson; and Maxwell filed an answer, containing a general denial of the facts alleged in the plaintiffs' petition. On this issue, as shown by the record, three trials have taken place before three different juries, and verdicts rendered in every instance in favor of the plaintiffs; on the last of which, judgment was pronounced, from which the defendant Maxwell took the present appeal.

According to the point filed in this court, on the part of the appellant, two principal grounds of defence appear to be assumed. The first relates to want of property shown in the plaintiff as holder of the bill, and improper pursuit on his part in not suing all the partners by whom it is alleged to have been accepted. The second embraces the whole merits of the case, as it affects the interest of the defendant who has appealed. It is attempted to show that the acceptance was made in fraud of his rights; by connivance between the payers of the bill and the acceptors who were drawers for their private benefit, to pay a debt of their own in which the firm of Hugh B. Maxwell, and Co. had an interest.

The state of the endorsements on the bill is relied on to show that the present plaintiff and alleged *bona fide* holder, is not the legal proprietor. The first endorsement by the payees is in blank, a full endorsement is made to the order of Augustus Guibert, which appears to have been stricken out by the present holder. This, according to the custom of merchants, he had a right to do. See Bailey on the law of Bills of Exchange, &c. p. 68, and the cases therein referred to.

In ordinary commercial partnerships, every one of the partners is bound *in solido* for the debts of the partnership; and the debt is presumed to be contracted in the name of the partnership; when one of the partners signs in the name of the company, &c. See old Civil Code p. 396, 98, art. 41. When several persons are bound *in solido*, or in

other words, when an obligation is joint and several, the obligee may pursue all the obligors jointly, or any one of them separately. The state of the pleadings in the case now under consideration, exhibits a contest between the plaintiff and one of the alleged acceptors of a bill of exchange, who is bound severally with his other partners to pay the amount for which it was drawn; unless there be shown some substantial objection to the validity of the obligation.

It is contended for the appellant that the acceptance of the bill in question created no obligation on his part, because his partners (admitting them to be such) used the name H. B. Maxwell, & Co. to pay off their individual debt, and that the plaintiff being only a trustee for the payers of the bill, must be subjected to any defence which would be good against them; consequences seriously affecting the appellee's claim might result from this means of defence if it had been fairly put at issue by the pleadings of causes in any stage of its progress before the several juries. This was not done and we are therefore of opinion, that all the evidence offered in favor of the defendant to support this species of defence, was properly rejected by the court below. The case if its character be determined by the petition and answer, is simply one between the endorser of a bill of exchange and an acceptor, and does not appear to have originated in circumstances which would authorise an inquiry into the consideration of the contract after the evidence of it has passed apparently in a fair course of trade, into the hands of a *bona fide* holder, such as the plaintiff alleges himself to be. The existence of a partnership between the appellant and the person who accepted the bill in the name of the firm, seems to have been proved to the satisfaction of three juries. It is true that the defendant offered to rebut the testimony given in support of this fact, by the exhibition of a project of partnership as contained in certain articles reduced to writing, but never signed by the party in consequence of some of the intended partners failing to comply with certain stipulations made on their part; and also to prove that the co-partnership was never carried into effect. The evidence thus offered was rejected by the judge *a quo;* and a bill of exceptions taken to the opinion by which it was so rejected.

We think the judge did not err in refusing to admit the evidence offered. The stipulations in the instrument, which when completed, were to have regulated the respective interests of the parties to the contract of partnership, being incomplete and unsettled, could in no manner affect the rights of third persons who had contracted with the firm as existing *de facto*, neither could the private acts of the partners composing the company; unless these acts were equivalent to a declaration of the non-existence or dissolution of the partnership and public notice given of these facts.

Upon a strict examination of the whole case as brought before this court, we are unable to discover any error in the proceedings or judgment of the court below.

It is, therefore, ordered, &c. that the judgment of the district court be affirmed with costs.

Pierce, for the plaintiff.

Watts and *Lobdell*, for the defendant.

Swift *v.* Williams *et al.* VI, N. S. 401.

EIGHTH District.

A grant of letters testamentary, is an order that the will be executed.

Poydras *v.* Hiriart. VI, N. S. 403.

The copy of a copy of an act of mortgage, does not authorise a suit of seizure.

Even when this copy makes a part of the record of a suit against the mortgagor, in which the third possessor intervened, if he did so to be relieved from a sequestration.

FOURTH District.

MATHEWS, J., delivered the opinion of the court.

This is an hypothecary action in which the plaintiff prays for an order of seizure and sale of a certain slave described in his petition, on which he claims a right of mortgage, and seeks to enforce it on the property in the hands of the defendant, a third possessor. The court below gave judgment of nonsuit against the plaintiff, from which he appealed.

The proceedings in the case were commenced under the government of the late Civil Code, and have been conducted in reference to the rules therein prescribed, in relation to actions of this kind. Ac-

cording to these rules, a plaintiff who desires to have mortgaged property seized in the hands of a third possessor, must produce a copy in due form of the act of mortgage, and a judgment against the principal debtor. Old Code, 469, art. 43.

In the present suit, the plaintiff produces a record of the proceedings and judgment, by him obtained against the principal debtor; and among these proceedings is found a copy of the instrument of mortgage as transcribed by the clerk of the court below, in which said proceedings were carried on. This is clearly not a copy in due form as required by the Code. It is only the copy of a copy, and consequently not directly certified by the officer entrusted to keep the registry of mortgages.

But to supply this defect, the counsel for the appellant insists on the intervention of the present defendant, in the suit commenced and carried on against the principal debtor. The object and the sole object of that intervention, as shown by the record of the proceeding which took place in that case, was to obtain relief by the intervening party against a sequestration, by virtue of which his slave had been seized. We believe it to be a circumstance which does not change his situation from that of ordinary third possessors of mortgaged property. The plaintiff failed to make out his case, by not producing a copy of the mortgage in due form, and the judge *a quo* acted correctly in nonsuiting him.

It is, therefore, ordered, &c., that the judgment of the district court be affirmed, with costs.

Cuvillier, for the plaintiff.

Eustis, for the defendant.

Poydras Delalande *v.* Hiriart. VI, N. S. 405.

FOURTH District.

MATHEWS, J., delivered the opinion of the court.

A rehearing has been granted in this case, in consequence of a supposed error or mistake of the court in its former judgment, in considering the matters in dispute between the parties, as under the government of the laws which were in force previous to the promulgation of the Louisiana Code.

[Poydras Delalande v. Hiriart.]

The action is hypothecary and directed against a third possessor since the New Code went into operation; but seems to have been conducted in reference to the provisions of our former laws, which required that a judgment should be obtained against the principal debtor before proceedings could regularly take place, to cause mortgaged property to be sold or delivered up by a third possessor, or compel him to pay the amount for which it might be hypothecated. Under the government of those laws, a judgment was obtained against the original debtor, and was made in part the basis of the present suit, although commenced since the promulgation of the Louisiana Code. These circumstances leave it, perhaps, doubtful as to the law which must govern the case. The art. 3364, of the New Code, seems to dispense with the necessity of obtaining judgment against the debtor; and allows a mortgagee creditor to pursue the third possessor directly, thirty days after demand of payment. The articles 69 and 70 of the Code of Practice are in conformity with that of the Civil Code just cited. This alteration in the law appears to be intended for the benefit of hypothecary creditors, and this benefit or advantage they may legally forego, and resort to the former mode of pursuing property in the hands of a possessor. In the present case the creditor was obliged to commence in pursuance of the rule established by the Code on the subject of hypothecary actions; as he instituted the suit against this debtor before the alteration introduced by the New Code and Code of Practice. And we are inclined to think, that the regulations under which the proceedings originated ought to be followed throughout.

But should all the advantages accorded by the last law on the subject, be allowed to the plaintiff and appellant, we do not believe that he can profit by them. This law in dispensing with the evidence of a judgment against an hypothecary debtor, in order that the creditor may pursue directly a third possessor, can not on any reasonable interpretation be supposed to authorise such pursuit, and recovery thereon, without producing a copy of his act of mortgage made in due form.

Cuvillier, for the plaintiff.

Eustis, for the defendant.

Mitchell *et al.* v. White *et al.* VI, N. S. 407.

PARISH Court of New Orleans.

When there is neither statement of facts, bill of exceptions, &c. the judgment is never disturbed, if any duly admitted evidence would support it.

Morgan *et al.* v. Their Creditors. VI, N. S. 409.

Where trustees are appointed in a country governed by the common law, to receive interest on a bond and pay it over to a *cestui que trust*, and the obligor fails; the trustees have authority to lend the money out to others.

FIRST District.

PORTER, J., delivered the opinion of the court.

Chandler Price, the obligee of a bond executed by the late Benjamin Morgan, due the first day of January, 1824, and bearing interest at the rate of six per cent. payable annually, by deed executed the 20th of September, 1825, at Philadelphia, in the state of Pennsylvania, declared "that in consideration of natural love and affection to my daughter Sarah Price Rose, I assign said bond to William E. Hulings and Joseph Reed; and in case of the death of either, or any other person to be appointed as hereafter mentioned, then to such person, and the survivor, as he the survivor shall appoint; *in trust*, for the sole and separate use of my said daughter, Sarah Price Rose; the interest to be paid to her during her life time, and her receipt alone to be sufficient, and on her death to such person as she, by any paper in the nature of a will, shall nominate," &c. &c.

Since the creation of this trust, an event, most probably not anticipated at the time it was made, has occurred, namely, the failure of the obligor. By the laws of this country, the note becomes due and demandable at once, and the trustees named in the deed already set

out, have obtained payment of it as they state, by a transaction of which the following instrument is the evidence:

"For and in consideration of the sum of sixteen thousand eight hundred and thirty dollars and five cents, the principal and interest of the bond, of which the within is a copy, and the original now in possession of the syndics of the estate of Benjamin Morgan; received in the note of Thomas A. Morgan, secured by a mortgage from him on the premises, late the estate of Benjamin Morgan deceased, purchased by the said Thomas A. Morgan from the syndics thereof, which said note is accepted by us in full payment and entire satisfaction of this bond; we do hereby assign, transfer, and set over unto the said Thomas A. Morgan, the said bond, and all the moneys due, and to become due, thereon."

At the foot of this instrument is one executed by the person for whose benefit the trust was created, in the following words: "I acknowledge to have received of Thomas A. Morgan, the full amount of interest due on the bond of which the within is a copy, and the original now in the possession of the syndics of Benjamin Morgan's estate; and hereby assign over to him all my interest in the same."

The appellee took a rule on the appellants, in the district court, requiring them to give up to him the note of the insolvent already mentioned, and three others similarly circumstanced. They objected to do so, and after argument the court decided that the appellee had a right to receive them. From this judgment, the syndics have appealed.

The only question presented to the court, is whether this transfer, by the trustees to the appellee, of the note, is a legal exercise of the powers vested in them by the deed of trust.

Two objections have been suggested to its correctness. *First*—that by the terms of the deed, the power of the trustees is limited to receiving the interest due on the bond, and no authority is conferred on them to collect the principal. *Secondly*—that if they have the power to collect the principal, they have no authority to exchange the notes in the insolvent's estate for those of any other individual.

As these objections are both founded on the idea of there being a necessity for a strict and literal performance of the trust, they may be considered together.

As the deed was executed in a country governed by the common law, and the assignment to the appellant was made there, the case must be examined in relation to that system of jurisprudence. As we are not familiar with it, we have had some diffidence in coming to a conclusion.

If the effect of the assignment was considered under the strict rules of the common law, there could be no question as to its validity, for the legal title is vested in the trustees, and they have passed it away. But the severity of that system has compelled the countries governed by it, to throw the whole control and jurisdiction of trust estates into their courts of equity. These courts with some aid from the legisla-

ture, have established, in relation to this subject, a system of rational jurisprudence by which trusts are made to answer all the beneficial objects society can receive from them. 7 Bac. Ab. 136; 2 Black. Com. 337.

The first and most important of their rules is to give effect to the intention of the creator of the trust, if it be possible. To accomplish this they look more to a substantial, than to a strict or formal performance of the duty imposed on the trustee. If an unforeseen event, which the party did not contemplate, arises, they will interfere so as to carry into effect the general intention. And it seems, though the rule is not clearly established, that whatever a trustee would be compelled to do by suit, he may do without it. 2 Fonblanque's Equity, 13, 2 *chap.* 7, *sect.* 2; *Ibid. chap.* 8, *sect.* 4; 3 Bro. Ch. Rep. 60; 2 Vernon, 137; 1 Bunbury, 136; 2 Freeman, 42; 2 Ch. Cas. 16; Sugden on Powers, 445 and 446; 2 Eq. Cases Abr. 668, 6 Vesey, jr. 793.

The application of these principles to a great variety of cases, may be found in the English books. Those most analogous to that before the court, are collected in 7 Bacon's Abridgment, 183; and the rule extracted from them is, "that where a trustee sells out stock contrary to the trust, the *cestui que trust* may elect to have the stock restored, or the produce of it paid. But if a trustee for the benefit of the trust estate, sells out of one fund and invests the produce in another, or transfers the money from one real security to another, the property continues unaltered, and he shall not be chargeable."

In the case before the court, the intention of the creator of the trust was, that his daughter should receive the interest on a certain sum of money, for the period therein mentioned, and at the expiration of it the principal. An unforeseen event has rendered it impossible for the interest to be collected in the manner indicated in the deed. The duty of the trustees, therefore, looking to the general intent, is, to provide a remedy against the occurrence, by putting the money out at interest some where else. This they could be compelled to do by the *cestui que trust*, and we have little doubt they may do so without compulsion. In exercising this power, the law requires a sound and honest discretion; and the extent to which they have used it here, seems as well sanctioned by authority, as it is by the reason of the thing. Whether they discharge the duty now devolved on them, by collecting the money from the insolvent's estate, and then lending it out, or by exchanging the notes of the bankrupt for those of another man, against whose solvency, and ultimate responsibility, no doubt has been expressed, is a difference in the mode, but not in the end.

But, admitting the principles on which this opinion has been just expressed, are erroneous, or that we have drawn unsound conclusions from them, the approbation of the *cestui que trust* clearly renders the transaction valid. She is not shown to be under disability arising from minority or other cause; and though at law she has neither *jus in re* nor *jus ad rem*, yet in equity she has both: she has

jus habendi, and *jus disponendi*, and her assent cures any defect that might otherwise exist in the power the trustees have exercised. 7 Bac. Ab. 180, 185; 3 Atk. 444.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Eustis, for the plaintiffs.

Hennen, for the defendants.

Watson *et al.* v. Pierce. VI, N. S. 416.

THIRD District.

A court cannot give judgment by default, on a petition addressed to another court. In this case a petition addressed by mistake to the district court of West Feliciana was filed in the office of the clerk of East Baton Rouge.

Nor should the court permit the petition to be amended.

Hawkins v. Vanwinkle. VI, N. S. 418.

Evidence, legal in itself, cannot be rejected, because something more may be necessary to make out the case.

FOURTH District.

PORTER, J., delivered the opinion of the court.

The plaintiff claims from the defendant a slave and other property which the defendant had taken into his possession, and prays that he may be enjoined from selling them under a writ of *fieri facias* which he had issued against one John M. Walker.

The defendant among other objections which he set out in his an-

swer to the demand of the petitioner, pleaded, that she was black and a slave, and as such was incapable of bringing suit.

On the trial of the cause, the plaintiff offered a deed of emancipation passed in Cincinnati, state of Ohio, to prove her emancipation: its introduction was objected to on the ground that previous to reading it, it was incumbent on her to prove the formalities (if any such there were) required by the laws of Ohio in emancipating slaves. The court sustained this objection, and rejected the instrument offered. There was judgment against the plaintiff, and she appealed.

The case has been submitted without argument. It is clear to us the court below erred. The deed should have been admitted for what it was worth. Where the evidence in a cause consists of a variety of facts, the tribunal before which it is tried, has certainly the power to prescribe that such order shall be pursued in their introduction, as will best tend to present the case in a clear and unembarrassed manner. But the exercise of this power can not be construed to extend so far as to authorise the rejection of evidence legal in itself, because something more may be supposed necessary to make out the case. That is an opinion which can only be expressed when the merits are gone into. If the case had been that the party was prepared to show by the laws of Ohio, that no previous steps were necessary, the most natural order was that resorted to, first to show the act of emancipation, and then to prove that it was valid by the laws of the country where it was executed. But the whole proceeding was in fact irregular. This was not the case of a slave suing for her freedom, but of a woman in the enjoyment of it, suing another for property which she alleged belonged to her. In such case the burthen of proving the fact of slavery was on the party making the allegation. By a law of the Partidas where a man claims another who is in the actual possession of liberty as his slave, the necessity of proving him such is thrown on the claimant—*a fortiori*, where the question arises collaterally with a third party; and the former master by his not interfering in the suit, furnishes a violent presumption that the state and condition of the plaintiff is that which she represents it to be. *Partidas* 3, *tit.* 15, *law* 5.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be avoided and reversed, and it is further ordered, adjudged and decreed, that the cause be remanded for a new trial, with directions to the judge not to reject the act of emancipation set forth in the bill of exceptions, because the plaintiff does not prove a compliance with the formalities (if any) required by the laws of the state of Ohio in emancipating slaves: the appellee paying the costs of this appeal.

McCaleb, for the plaintiff.

Cassedy v. Louisiana State Insurance Company. VI, N. S. 421.

A demand of payment for a total loss, amounts to abandonment.

FIRST District.

PORTER, J., delivered the opinion of the court.

This is an action on a policy of insurance: there have been two verdicts in favor of the plaintiff in the court below. The first was set aside in this court, and the cause remanded in consequence of an error in the charge of the judge. No objection of that kind is made now, and the cause stands before us on its merits.

There is no evidence whatever of a formal abandonment, but there is proof that a person holding the policy called on the defendants, and made a demand as for a total loss; that they asked him if the policy was endorsed to him, or if he had a power of attorney, and that on his answering in the negative, they stated, that the matter must lie over until he obtained an authority, and advised him to write for it. The witness was the person by whom the insurance had been effected.

Whether a simple demand for a total loss amounts to an abandonment or not, is a question which can not yet be considered as settled. Mr. Phillips who has collected the cases in his late treatise on insurance, shows, that it has been decided both affirmatively and negatively in England. The doctrine appears however well understood, that no particular form of abandonment is necessary, and under this principle we are of opinion that a demand of payment as for a total loss amounts to it. The less the transactions of merchants, and all other classes of society are fettered by forms and technical rules, the better are the ends of justice promoted, because there is great difficulty in getting the world to understand and follow them. Courts therefore act correctly, where positive regulations do not prevent them, in looking at the intention of the parties and their understanding, rather than to forms. A demand for a total loss, if not necessarily, at least most strongly implies the doing of that on the part of him making the demand, without which it could not be rightfully made. Payment made on it would certainly vest the right of the insurer in the insured. It therefore naturally follows, that in demanding the payment, the insured avowed his intention of divesting himself of his right to the property and transmitting it to the insurers. Phillips on Ins. 447; 3 Moore, 115; 12 East, 488.

[Cassedy v. Louisiana State Insurance Company.]

An objection has been taken to the want of authority in the agent to make the demand. But it appears he was the same person who effected the insurance, and as such was authorised to abandon, and adjust the loss, more particularly as he was the holder of the policy of insurance. Phillips on Ins. 519; 1 Campbell, 43; 6 Cranch, 272.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Preston, for the plaintiff.

Eustis, for the defendants.

Mellon *v.* Louisiana State Insurance Company.
VI, N. S. 424.

Whether an abandonment was made in due time, is a proper question to be acted on by the jury.

FIRST District.

MATHEWS, J., delivered the opinion of the court.

This is an action on a policy of insurance executed by the defendants on goods shipped by the plaintiff on board the schooner Samuel Smith, on a voyage from New Orleans to *Port au Prince*. The vessel encountered a severe gale of wind on her passage, and was obliged to put into Savannah. A survey was then held on her, and in consequence of the damage she had sustained, she was condemned—the voyage was broken up, and the cargo sold. The plaintiff claims as for a total loss.

The cause has been submitted to two juries who have both found for the plaintiff.

The fact of the voyage being broken up, and the propriety of selling the articles insured, have not been contested. The principal, we may almost say, the only question in the cause is, whether there was such an abandonment of the insured's interest in the property saved as will enable him to recover as for a total loss.

The cargo was sold in Savannah on the 20th June, 1825. On the 4th or 5th of August, the agent of the plaintiff made a demand of the defendants of payment for a total loss. On the 3d of November, the

plaintiff, who had been a resident of Philadelphia for some months previous, made a formal abandonment.

A question has been made, whether a demand for a total loss amounts to an abandonment. But in this case, a decision of that point is unnecessary, for there was a regular abandonment. It is true it has been contended that abandonment was made too late. But whether it was or not, or in other words, whether it was made in a reasonable time, was a question of fact to be decided by the jury under all the circumstances of the case; and we do not see any thing which shows such error in the conclusion they came to as to induce us to send the cause back for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Watts and *Lobdell*, for the plaintiff.

Eustis, for the defendant.

Brown v. Thompson. VI, N. S. 426.

In sales made before the promulgation of the new Code, the rights of the parties are to be regulated by the provisions of the former Code.

Observe, it is by the Louisiana Code that the innovation was introduced, that danger of eviction without *actual* disturbance *does authorise* the vendee to retain the price unless the vendor will give him security.

THIRD District.

MARTIN, J., delivered the opinion of the court.

The payment of the balance of the price of a tract of land, sold by the plaintiff to the defendant, was resisted on the ground of a want of title in the former; and it is further urged, that the latter is actually disturbed, suit having been brought against him in his capacity of curator to the estate of Cooke, one of the joint purchasers of King & Hacket, of a tract of land, part of which was sold by King to the plaintiff, and by the plaintiff to the defendant. There was judgment against the latter and he appealed.

As the sale to the defendant took place before the adoption of the new Civil Code, his rights under it, and those of his vendors, cannot be affected by any provision peculiar to the new Code; it follows, therefore, that a danger of eviction does not authorise the vendee to

retain the price, whilst there is no disturbance. 7 *Martin*, 223; Abat *v.* Casteres, 3 *N. S.* 220; Exnicios *v.* Weiss, *Ibid.* 480; Gardere *v.* Weiss, *Ibid.* 352.

The new Code adds to the contract of sale a new clause, which prevents the recovery of the price, in a case in which it was legally demandable. It imposes the obligation of giving security for returning it; an obligation, in every instance very burdensome, and in many impossible; and the case of the vendor is rendered still harder by his being unable to recover back his property, while he cannot claim the price.

The suit against the defendant in his capacity of curator to the estate of Cooke, cannot affect his individual property, nor the rights of King, the joint owner of Cooke.

Interest was properly allowed on the price of the land.

It is therefore ordered, &c. that the judgment of the district court be affirmed, with costs.

Morse, for the defendant.

END OF VOLUME III.

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